In the Supreme Court

Appeal from the Court of Appeals
Honorable William B. Murphy

ESTATE OF BETTY JEAN SHINHOLSTER,
deceased, by JOHNNIE F. SHINHOLSTER,
Personal Representative,
Plaintiff-Appellee,

v. **Docket No. 123720**

ANNAPOLIS HOSPITAL, assumed name for
OAKWOOD UNITED HOSPITALS, INC.,
Defendants-Appellants,

and

DENNIS ADAMS, M.D. and MARY ELLEN
FLAHERTY, M.D.,
Defendants.

BRIEF OF APPELLANT ANNAPOLIS HOSPITAL/ OAKWOOD UNITED HOSPITALS, INC.

Oral Argument Requested

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JURISDICTIONAL STATEMENT

After a jury trial, Wayne County Circuit Court Judge John A. Murphy entered a judgment on January 4, 2000 in favor of plaintiff against all defendants. Subsequently, motions for new trial/remittitur/modification or alteration of judgment were filed by the defendants, which were denied by order of February 14, 2000. Defendant Annapolis Hospital timely sought leave to appeal with the Court of Appeals. The Court of Appeals issued a published opinion, authored by Patrick M. Meter and concurred in by William B. Murphy and Richard Allen Griffin, on February 14, 2003 affirming the judgment. Annapolis Hospital timely filed a motion for rehearing which was denied by order of the Court of Appeals entered on April 1, 2003. The hospital thereafter timely filed an application for leave to appeal with this Court, which was granted by order entered on November 21, 2003. This Court has jurisdiction pursuant to MCR 7.301(A)(2) and MCR 7.302.

STATEMENT OF QUESTIONS PRESENTED

I. **Whether the jury's consideration and evidence admitted was improperly limited to only post April 7, 1995 noncompliant behavior and whether a new trial is required?**

Plaintiff argues the answer is "No."

Defendant Annapolis Hospital submits the answer is "Yes."

The Court of Appeals held the answer is "No."

The trial court held the answer is "No."

II. **Whether the exceptions which allow application of the higher tier of the non-economic damages cap do not apply where the patient is deceased at the time the verdict is rendered and the judgment entered?**

Plaintiff argues the answer is "No."

Defendant Annapolis Hospital submits the answer is "Yes."

The Court of Appeals held the answer is "No."

The trial court held the answer is "No."

III. **Whether the trial court erred in not reducing future damages in this death case to their present value regardless of the age of the decedent at the time of the death or the age of the personal representative?**

Plaintiff argues the answer is "No."

Defendant Annapolis Hospital submits the answer is "Yes."

The Court of Appeals held the answer is "No."

The trial court held the answer is "No."

STATEMENT OF FACTS

In this medical malpractice action, the plaintiff alleged that the defendants were negligent in failing to diagnose an "impending stroke" during two emergency room visits in April of 1995 and that the decedent subsequently had a stroke cause by, among other things, uncontrolled hypertension (Appendix p 10A, Complaint ¶ 35). However, the evidence established that the decedent did not consistently take medication prescribed to control her high blood pressure and often failed to see her doctor as instructed and that this was the cause of her death. The decedent's medical treatment, both prior to the emergency room visits in question and the emergency room visits themselves, will be discussed in greater detail in the body of the argument portion of this brief. For purposes of summary and background, the following is presented.

A. Plaintiff's Theory of the Case

It was plaintiff's theory that although Mrs. Shinholster was not always good about taking her blood pressure medicine, based on the complaints during the April, 1995 emergency room visits to Annapolis Hospital, Mrs. Shinholster was suffering from an "impending stroke." Plaintiff further theorized that an impending stroke can be diagnosed and that the doctors who saw Mrs. Shinholster at Annapolis Hospital in April of 1995 should have diagnosed such impending stroke (see Tr of 8/30/99, pp 130-131, 133).

B. Defendants' Theory of the Case

It was defendants' theory that the treatment rendered to Mrs. Shinholster during each of her emergency room visits was reasonable and appropriate, and that none of the defendants breached the standard of care. During each of the emergency room visits to Annapolis Hospital, the decedent's complaints were properly addressed, her blood pressure was brought under control

and she indicated prior to discharge that she felt fine. At the conclusion of each emergency room visit, the decedent was advised again about the importance of taking her medications as prescribed and following up with her family doctor for control of her hypertension. This treatment, and these instructions, fully complied with the standard of care (see Tr of 8/31/99, pp 34-35, 41, 50-51). Unfortunately, Mrs. Shinholster did not follow this advice.

The defendants recognized that Mrs. Shinholster was a patient with uncontrolled hypertension and that she might develop any of the afflictions that can evolve from such a condition, including a stroke. As the record reveals, she was referred repeatedly to her own family physician for evaluation, treatment and proper medications. Mrs. Shinholster neglected to follow the direction of the defendants and the advice of her family doctor. Ultimately, this was the proximate cause of Mrs. Shinholster's demise. (Id.)

C. The Relevant Medicine

High blood pressure or hypertension is a disease characterized by elevated blood pressures (Appendix p 47A). The top number in a blood pressure reading is referred to as the systolic blood pressure reading (Appendix p 77A). The systolic pressure is the amount of pressure pushing blood through the arteries when the heart is pumping (Appendix p 54A). A number up to 140 for a systolic reading would be considered normal (Appendix p 77A). The bottom number for a blood pressure reading is referred to as the diastolic reading (Appendix p 78A). The diastolic reading is the more important, or key reading, of the two measurements (Appendix p 139A). The normal or optimal diastolic blood pressure reading is between 80 and 90 (Appendix p 78A).

The precise cause for most cases of hypertension is unknown (Appendix p 113A). Sometimes it is caused by chronic brain disease, sometimes by hardening of the arteries, but most cases of hypertension, including that of the decedent in this case, are unknown (Appendix p 113A).

As was undisputed at trial of this matter, control of blood pressure for someone with hypertension is absolutely essential (Appendix p 114A). This is because high blood pressure can cause a stroke (Appendix p 47A).

Anti-hypertensive medications are one of the methods used to treat high blood pressure (Appendix p 114A). Procardia is an anti-hypertensive medication (Appendix p 47A). Altace and Hytrin are also anti-hypertensive medications (Appendix p 26A).

D. Relevant Prior Medical History

In April 1994 the decedent presented to the emergency department of Annapolis Hospital with symptoms of high blood pressure (Appendix p 24A). It is undisputed that the blood pressure reading as of this emergency department visit was extremely high, evidencing uncontrolled hypertension for a number of years (Appendix pp 115A-116A). Because the decedent did not have a family physician or primary care physician whom she was treating with at this time, the decedent was referred to the internist on call at Annapolis Hospital's emergency department, Dr. Normita D. Vicencio, M.D. (Appendix pp 23A-24A).[1] Dr. Vicencio first saw the decedent on April 8, 1994 (Appendix p 23A). At that time, the decedent's medical problem was high blood pressure (hypertension). The decedent had not seen or followed regularly with

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[1] The care of Dr. Vicencio was not criticized by plaintiff in this lawsuit.

another physician for a long-time (Appendix p 24A). Dr. Vicencio continued to treat the decedent until September 9, 1994, which was the last appointment kept by the decedent (Appendix pp 24A-25A). The decedent was told of the risks of high blood pressure (Appendix p 63A).

At the time of the April 8, 1994 initial appointment, the decedent told Dr. Vicencio that she had a prior medical history of hypertension and that she was not taking any medications to control same (Appendix pp 24A and 47A).[2] On April 8, 1994, Dr. Vicencio prescribed Procardia to treat the elevated blood pressure (Appendix p 25A). When the decedent returned on April 27, 1994, her blood pressure was still elevated at 160/104 (Appendix p 49A). As a result, Dr. Vicencio added Altace to help control the blood pressure (Id.). On May 18, 1994 the decedent returned to see Dr. Vicencio. Her blood pressure was still high, 160/100 (Appendix p 50A). Altace was discontinued and the decedent was started on Hytrin to help attempt to control the hypertension (Appendix p 50A). After, seeing the decedent again on May 27, 1994, and instructing her to return in one month, Dr. Vicencio did not see the decedent again until almost three months later on August 12, 1994 because the decedent did not return in one month as recommended (Appendix p 51A). At this time the decedent told Dr. Vicencio that she had not taken her Hytrin to control her blood pressure for a month (Appendix p 52A). Her blood pressure was elevated at that time to 160/110 (Appendix p 52A). Dr. Vicencio next saw the decedent on August 26, 1994. Again on this date her blood pressure was still uncontrolled at 160/104.

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[2] The medical history of the decedent prior to the care rendered by Dr. Vicencio is not well-known. The most likely source of such medical history would be the decedent's husband, Johnnie Shinholster. However, Mr. Shinholster testified that he did not know the physician of the decedent prior to her treatment with Dr. Vicencio (Appendix p 102A).

(Appendix p 53A).

Dr. Vicencio last saw the decedent on September 9, 1994. At this time her blood pressure was still uncontrolled at 150/100 (Appendix pp 53A-54A). Despite Dr. Vicencio's instruction for the decedent to return to see her in two weeks to continue to monitor her high blood pressure, the decedent never returned (Appendix p 55A).

E. Care and Treatment at Issue

Defendant, Dennis Adams, M.D. testified at trial that he was working in the emergency room at Annapolis Hospital on April 7, 1995, when Betty Shinholster presented at the emergency department complaining of being dizzy and having a buzzing in her right ear (Appendix pp 75A-76A). Notably, her blood pressure was very elevated, 186 over 127. According to Dr. Adams, the markedly elevated blood pressure evidenced that her hypertension was uncontrolled and dangerously high. Mrs. Shinholster admitted to the nurses that she had not taken her blood pressure medication for months and that she was supposed to be taking Procardia (Appendix p 81A). This is consistent with the trial testimony of the decedent's husband, that the decedent took her blood pressure medications intermittently, when she did not feel well (Appendix pp 103A-104A).

Because of her high blood pressure the decedent was given Procardia in the emergency department on April 7, 1995 at approximately 9:30 p.m. in an attempt to lower the blood pressure (Appendix p 78A). By 9:40 p.m., her blood pressure had been lowered to 153 over 78 (Appendix p 79A). At 10:05 p.m., her blood pressure was 144 over 93 (Appendix p 79A and Appendix p 232A ; medical records of 4/7/95 visit).

The decedent was given Procardia right away in order to eliminate the extremely high blood pressure (Appendix pp 96A-97A). Since there were no neurological symptoms after the correction of her blood pressure, and the dizziness and buzzing in her ear resolved, it showed that such symptoms were the result of vertebral basilar insufficiency (Appendix p 97A). Before discharge, Dr. Adams talked to the plaintiff's treating family practitioner, Dr. Vicencio (Appendix p 84A) and both he and Dr. Vicencio agreed to place the patient on Procardia XL-60, an extended release tablet (Appendix pp 85A and 90A).

Dr. Adams made a determination that the patient was neurologically intact (Appendix p 83A). He recommended that Mrs. Shinholster see Dr. Vicencio in one to two days (Appendix p 86A) but that she return if she had problems (Appendix pp 87A and 98A).

Rather than see Dr. Vicencio, the decedent returned to the emergency department at Annapolis Hospital the following Monday, April 10, 1995, at approximately 8:15 p.m. complaining of intermittent dizziness and was first seen by the triage nurse. According to the triage nurse's note, Ms. Shinholster advised that she was taking no medication and that she had no past medical history (Appendix pp 95A and 236A). At approximately 10:45pm, she was again seen by Dr. Adams (Appendix pp 89A and 92A). She was pale, had cool skin, and her pulse was irregular (Appendix p 89A). Her blood pressure was 114 over 78, which was a little bit on the low side (Appendix p 90A). According to the chart, she told Dr. Adams that she was feeling fine at that point in time (Appendix p 92A). Dr. Adams wanted to do some tests, but the decedent refused (Appendix pp 93A-94A) and advised that she wanted instead to follow up with her private physician (Appendix p 94A). She never did so (see testimony of Dr. Vicencio and Johnnie Shinholster).

Mary Ellen Flaherty, M.D., who is board certified in the specialty of emergency medicine saw the decedent in the emergency room at Annapolis Hospital on April 14, 1995 (Appendix p 118A). The decedent complained of feeling woozy and having a rushing sound in her ear (Appendix pp 119A-120A). The decedent also complained of palpitations (Appendix p 126A and Appendix p 239A , medical records of 4/14/95). Her blood pressure at the time of triage taken by the nurse was 143 over 119 (Appendix p 121A). Twenty minutes later, when Dr. Flaherty took her blood pressure it was lower, 140 over 80 (Appendix p 121A). Dr. Flaherty ordered a complete blood count, a glucose test and electrolyte test, a CBKMB, a CPK, and an EKG and also placed Mrs. Shinholster on a cardiac monitor (Appendix pp 122A-123A). The CBKMB and CPK are enzyme studies to see if a heart attack was the problem (Appendix p 123A). Dr. Flaherty concluded that the decedent's problems were not related to a heart attack (Appendix p 124A). Dr. Flaherty discontinued Hismanal, an antihistamine Mrs. Shinholster indicated that she was taking. No one knows where Mrs. Shinholster obtained the Hismanal (a prescription drug). Dr. Flaherty was concerned that the Hismanal might be causing the palpitations complained of by Mrs. Shinholster (Appendix pp 125A and 127A).

Subsequently, Mrs. Shinholster suffered a massive cerebrovascular accident or stroke on April 16, 1995, was in a coma and ultimately died on August 26, 1995 (Appendix pp 35A-36A, 46A).

F. Trial, the Jury's Verdict and Post Trial Motions

Trial in these consolidated medical malpractice cases began on August 30, 1999 and continued for 10 days, resulting in a jury verdict on September 14, 1999 in favor of the plaintiff against all defendants. There were no claims of independent negligence against the hospital as

the only claims asserted against the hospital were ones of vicarious liability for the alleged acts or omissions of Dr. Adams and Dr. Flaherty. The jury found the plaintiff and all defendants negligent, attributing 50% to Dr. Adams, 30% to Dr. Flaherty and 20% to the plaintiff's decedent, Betty Shinholster (Tr of 9/14/99, pp 3-4). On January 4, 2000, a judgment was entered for $916,480.00 (See 1/4/00 order of judgment (Appendix p 243A). The verdict total was for $1,145,600.00 (economic damages to the date of the verdict of $220,000.00; non-economic damages to the date of the verdict of $564,600.00; future economic damages of $48,000.00 and future non-economic damages of $62,500.00) (Appendix p 244A). Since the jury found the decedent 20% at fault, the verdict was reduced by 20% to $916,480.00, and the judgment was entered on January 4, 2000 (Appendix pp 243A-245A).

A motion for new trial/remittitur/modify or alter judgment was filed by co-defendants Adams and Flaherty and Annapolis Hospital filed a concurrence. A hearing on the post-judgment motions was held on February 11, 2000. The trial court subsequently issued an opinion and order on February 14, 2000 denying the motions for new trial/remittitur/modification or alteration of the judgment (Appendix p 246A). In that opinion and order, the trial court also ruled that the higher tier cap of the non-economic damages cap in MCL 600.1483 applies to this cause of action (Appendix pp 251A-254A).

G. Court of Appeals' Decision

On February 14, 2003, the Court of Appeals issued a published opinion, authored by Judge Patrick M. Meter, affirming the order of judgment (Appendix p 259A). While defendants raised several issues before the Court of Appeals, this defendant has limited the issues to this Court to

three.[3]

The first issue concerns the proper instruction on comparative negligence. As the Court of Appeals recognized, this issue was one of first impression. The Court of Appeals rejected the defendants' request that since Michigan requires that liability be apportioned directly in accordance with each party's fault, the jury should have been allowed to consider whether the decedent's noncompliant behavior, including her failure to take regularly her blood pressure medication in the year before her death, was a proximate cause of her fatal stroke. (Appendix p 260A). Relying on the implications of this Court's holding in Podvin v Eickhorst, infra, as well as the rationale expressed in cases of other jurisdictions and the note to the Restatement of Torts, 3d, Apportionment of liability, § 7, the Court of Appeals concluded that the trial court properly limited the jury's consideration of the decedent's negligence to acts or omissions after the April 7, 1995 emergency room visit since:

> the jury could not consider Shinholster's potential negligence in causing the condition for which she sought medical treatment in the first place. Given the preventable nature of many illnesses, to accept the contrary position would allow many health care professionals to escape liability for negligently treating ill patients. [Appendix pp 263A-264A.]

The second issue concerns whether the higher or lower tier of the non-economic damages cap in MCL 600.1483 applies. The higher tier cap only applies if one of three exceptions are

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[3] In addition to the issues addressed in this appeal, defendants also raised before the trial court and the Court of Appeals the improper admission of expert testimony on the decedent's life expectancy, the improper instruction on the mortality table in the Standard Jury Instruction, the improper reduction of collateral source benefits, and the improper order of the reduction for comparative negligence and the application of the cap.

satisfied. These include hemiplegia, paraplegia or quadriplegia resulting in a total permanent functional loss of 1 or more limbs caused by injury to the brain or spinal cord, permanently impaired cognitive capacity rendering the patient incapable of making independent, responsible life decisions and permanently incapable of independently performing the activities of normal, daily living, or permanent loss of or damage to a reproductive organ resulting in the inability to procreate (Appendix p 266A). Rejecting the position that since the death occurred prior to the filing of the case and/or the verdict and that the exceptions could not be satisfied, the Court of Appeals held that the "point of reference for determining whether the injured person fits within MCL 600.1483(1)(a), (b), or (c) is *any time after and as a result of* the negligent action" (Appendix p 267A; emphasis in original).

Finally, the third issue is whether the trial court erred in failing to reduce the jury's award of future damages to present value under MCL 600.6306. Under MCL 600.6311, an exception exists for plaintiffs over 60 years of age. This issue concerns the interpretation of "plaintiff" in the context of a wrongful death action. The Court of Appeals concluded that since both the decedent and the personal representative were over 60 years of age it was not necessary to resolve the ambiguity (Appendix p 269A).

SUMMARY OF ARGUMENT

There are three issues before this Court. The first issue concerns the jury's consideration of the comparative negligence of the plaintiff's decedent. Our Legislature has adopted a comparative negligence statute, MCL 600.2959 and an apportionment of liability statute, MCL 600.6304, which require the jury to consider and decide the comparative negligence of the plaintiff in all tort actions. These statutes do not exclude medical malpractice claims from their provisions, nor do the statutes place a time restriction on the jury's consideration of the negligent acts or omissions of the plaintiff's decedent. The statutes simply require the jury to determine whether the plaintiff's decedent was negligent and if so whether such negligence was a proximate cause of the injury alleged. If decided in the affirmative, the statutes direct the jury to assign a percentage of fault attributably to the plaintiff's decedent.

Contrary to this explicit statutory requirement, the trial court and the Court of Appeals limited the jury's consideration of the comparative negligence of the decedent to the time period after the treatment at issue. There is no such restriction in the statutory provisions. The Court of Appeals ignored the clear reading of the statutes to impose additional requirements in medical malpractice actions. Such judicial legislation is improper.

The evidence established that the decedent was negligent in failing to take her high blood pressure medication as instructed and in failing to return to her doctor for further treatment. Further, there was evidence that such behavior was a proximate cause of the ultimate stroke and death. In additional, the introduction of further evidence of proximate cause was precluded by the trial court's decision during the examination of defendants' expert that such evidence was not relevant to the issues to be present to the jury. As such, a new trial is required.

The second issue is whether the lower tier of the non-economic damages cap in MCL 600.1483 should have been applied in this case. The cap provides three exceptions which will trigger the application of the higher tier cap. However, based on the clear and unambiguous language of the cap statute, the exceptions for the application of the higher tier cap only apply if the patient is currently liying at the time the verdict was rendered and the judgment was entered. Such is based on the cap statute's use of "present tense" verbs, as well as the Legislature's provision in MCL 600.6098 which requires that the trial court determine the applicability of the cap after the verdict. Based on these statutory provisions, the Legislature stated its intent that an evaluation of the exceptions for the application of the higher tier cap be made after the jury has returned a verdict. Since Betty Shinholster was deceased at this time, she could not currently have any of the conditions which would allow the application of the higher tier cap.

Finally, the trial court erred in not reducing future damages to present cash value. MCL 600.6311 is ambiguous in it's use of the word "plaintiff." In this case, since the patient was deceased at the time of the trial and verdict, a fair and proper reading of the statute requires that future damages be reduced to their present cash value.

ARGUMENTS

I. The jury's consideration and the evidence admitted was improperly limited only to post April 7, 1995 noncompliant behavior and a new trial is required.

The evidence established, without contradiction, that the decedent was noncompliant in following her doctor's advice and instructions to control her high blood pressure. Further, there is no dispute that the decedent's uncontrolled high blood pressure resulted in her stroke and ultimate death. Nonetheless, the jury's consideration of the decedent's noncompliant and negligent behavior was improperly limited to her acts after April 7, 1995 (the date initially alleged to involve negligent treatment by the defendants) for the purposes of finding comparative negligence.

The current statutory scheme adopted in the 1995 tort reform act clearly and unambiguously provides that the jury is to consider and decide the negligence of all parties and non-parties and assign a percentage of fault to each. The damages recoverable are controlled by such findings. Contrary to this statutory scheme, the Court of Appeals applied different rules in medical malpractice actions. Such interpretation and ruling by the lower court is not supported by the statutory language of sections 2959 and 6304. There is no provision in the comparative negligence statute, MCL 600.2959, or allocation of fault statute, MCL 600.6304, limiting a jury's consideration of a plaintiff's negligence to the time period after the treatment in question. Defendant submits that such limitation, and the trial court's resultant jury instructions, were improper and inconsistent with substantial justice. A new trial is required.

A. Standard of review and how issue was preserved.

Issues of law as well as issues of statutory construction are reviewed de novo. Robertson v Daimler Chrysler Corp, 465 Mich 732, 739; 641 NW2d 567 (2002). Further, claims of instructional error are also reviewed de novo. The Court will reverse instructional error if inconsistent with substantial justice. Case v Consumers Power Co, 463 Mich 1, 6; 615 NW2d 17 (2000). The issue of what evidence could be introduced regarding comparative negligence and proximate cause (including expert testimony) and what jury charge should be given was discussed in detail on September 7, 1999 and September 9, 1999 (Appendix pp 140A-172A and Tr of 9/9/00, pp 36, 46 - 47, 56 - 58).

B. The comparative negligence instruction given at trial and the Court of Appeals ruling.

Rejecting the use of the Standard Jury Instruction on comparative negligence, SJI2d 11.01[4], the trial court instead gave the following modified jury instruction, limiting consideration to only contributory acts after April 7, 1995:

> It was the duty of the plaintiff in connection with this occurrence to use ordinary care for her own safety.
>
> Members of the jury, the total amount of the damages that the

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[4] SJI2d 11.01 [now M Civ JI 11.01] provides:

> Plaintiff's negligence, if any, does not bar a recovery by the plaintiff against the defendant, but the total amount of damages to which the plaintiff would otherwise be entitled shall be reduced by the percentage that plaintiff's negligence contributed as a proximate cause to his/her injury/property damage.
>
> This is known as comparative negligence. [SJI2d 11.01.]

> plaintiff would ever be entitled to recover will be reduced by the percentage of plaintiff's negligence after April 7th, 1995, that contributed as a proximate cause to her injury. [Appendix p 191A.]

The trial court further instructed the jury that it could only consider evidence regarding the acts of the plaintiff's decedent regarding her failure to follow Dr. Vicencio's recommendations and instructions, in the context of whether she followed the instructions of the emergency room doctors at Annapolis Hospital from April 7 through April 11, 1995:

> Members of the jury, there was evidence in this case regarding the medical habits of the deceased as to whether she followed Dr. Vicencio's orders and took her medications properly prior to her treatment with defendant doctors. This evidence may not be the basis for any findings that the deceased was comparatively negligent before April 7, 1995 the date she sought treatment from the defendants.
>
> You may consider this as evidence only in determining whether she filed [sic followed] the orders of defendants Adams and Flaherty and other staff members of the hospital. [Appendix p 192A.]

The Court of Appeals affirmed, concluding that the apportionment of fault statutory scheme adopted in the 1995 tort reform act should be read to include a requirement in medical malpractice actions that the acts of a plaintiff or a plaintiff's decedent prior to the initial treatment date with the defendants may not be considered by the jury (Appendix p 263A-264A).

C. Based on both the clear and unambiguous language of section 2959, the jury should have been allowed to consider all of the decedent's contributory acts which caused the fatal stroke.

Based on the clear and unambiguous language of the comparative negligence statute, MCL 600.2959, the apportionment of fault statute, MCL 600.6304, as well as the common law, the jury should have been allowed to consider all of the decedent's contributory acts and omissions, even

those committed prior to the date of treatment at issue in the case.[5] Contrary to the explicit statutory language, the Court of Appeals agreed with the trial court and essentially grafted an additional component onto the statute. The lower court held that the jury was properly precluded from considering the negligence of the plaintiff's decedent prior to the treatment at issue. There is no such limiting language in the comparative negligence statute or the apportionment of liability statute.

1. The comparative negligence statute does not restrict its application to non-medical malpractice actions or to a date after the treatment in question.

MCL 600.2959, which was adopted as part of the 1995 tort reform acts, 1995 PA 161, provides no limitation on the jury's consideration of the acts of a plaintiff in a medical malpractice case:

> In an action based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death, the court shall reduce the damages by the percentage of comparative fault of the person upon whose injury or death the damages are based as provided in section 6306. If that person's percentage of fault is greater than the aggregate fault of the other person or persons, whether or not parties to the action, the court shall reduce economic damages by the percentage of comparative fault of the person upon whose injury or death the damages are based as provided in section 6306, and noneconomic damages shall not be awarded. [Pertinent statutory provisions attached as Addendum A.]

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[5] Prior to the jury's verdict, plaintiff's counsel acknowledged that there was not proximate cause evidence to link any alleged negligence of the defendants on April 7, 1995 to the decedent's stroke and death (Tr 9/9/99, pp 64-70). Nontheless, this was the cut off date utilized by the trial court in its instructions.

Subsection 3 of MCL 600.6306 is the provision relevant to a plaintiff's comparative negligence. It provides:

> If the plaintiff was assigned a percentage of fault under section 6304, the total judgment amount shall be reduced, subject to section 2959, by an amount equal to the percentage of plaintiff's fault. When reducing the judgment amount as provided in this subsection, the court shall determine the ratio of total past damages to total future damages and shall allocate the amounts to be deducted proportionally between the past and future damages. [Addendum A.]

The comparative negligence statutory provision is consistent with the 1995 amendments to MCL 600.2957, requiring the jury to apportion liability and percentages of fault among parties and non-parties. Subsection 1 provides:

> In an action based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death, the liability of each person shall be allocated under this section by the trier of fact and, subject to section 6304, in direct proportion to the person's percentage of fault. In assessing percentages of fault under this subsection, the trier of fact shall consider the fault of each person, regardless of whether the person is, or could have been, named as a party to the action. [Addendum A.]

As noted in sections 6306 and 2957, MCL 600.6304 provides the mechanism for the jury to determine the fault of the plaintiff, as well as the defendants:

> (1) In an action based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death involving fault of more than 1 person, including third-party defendants and nonparties, the court, unless otherwise agreed by all parties to the action, shall instruct the jury to answer special interrogatories, or if there is no jury, shall make findings indicating both of the following:
>
> (a) The total amount of each plaintiff's damages.

(b) The percentage of the total fault of all persons that contributed to the death or injury, including each plaintiff and each person released from liability under section 2925d, regardless of whether the person was or could have been named as a party to the action. [Addendum A.]

There is no provision in any of these statutes, most notably in neither section 2959 nor 6304, which exclude their application in medical malpractice cases. The language of these statutes is clear and unambiguous and thus there is no room for judicial construction or interpretation.

> A fundamental principle of statutory construction is that "a clear and unambiguous statute leaves no room for judicial construction or interpretation." When a Legislature has unambiguously conveyed its intent in a statute, the statute speaks for itself and there is no need for judicial construction; the proper role of a court is simply to *apply* the terms of the statute to the circumstances in a particular case. Finally, in construing a statute, we must give the words used by the Legislature their common, ordinary meaning.
>
> These traditional principles of statutory construction thus force courts to respect the constitutional role of the Legislature as a policy-making branch of government and constrain the judiciary from encroaching on this dedicated sphere of constitutional responsibility. Any other non-textual approach to statutory construction will necessarily invite judicial speculation regarding the probable, but unstated, intent of the Legislature with the likely consequence that a court will impermissibly substitute its own policy preferences. [People v McIntire, 461 Mich 147, 153; 599 NW2d 102 (1999) quoting Coleman v Gurwin, 443 Mich 59, 65; 503 NW2d 435 (1993); citations omitted.]

The Legislature has clearly and unambiguously provided that the trier of fact must determine the responsibility of all persons, including plaintiffs, for the injuries alleged in tort actions filed in this state, including complaints alleging medical malpractice. The trier of fact

must, according to section 6304, make findings of the "percentage of the total fault of **all persons** that contributed to the death or injury, **including each plaintiff** . . . ." Under section 2959, as well as 6306, the court must "reduce the damages by the percentage of comparative fault of the person upon whose injury or death the damages are based . . . ."

None of these statutes exclude from the above requirement, actions which allege claims of medical malpractice. In fact, the Legislature has unambiguously provided in the statutes themselves that they apply to all tort actions. MCL 600.2957, MCL 600.2959 and MCL 600.6304 state at their very beginnings: "**In an action based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death** . . . ." No language is included distinguishing medical malpractice actions from other tort actions.

Further, none of these statutes, including section 2959, place a time restriction on the jury's consideration of the decedent's negligent acts or omissions. No such limiting language exists in any statute. The statutes merely provides that the damages shall be reduced by the percentage of comparative fault of plaintiff. The jury can only find comparative fault if it finds that the negligence of plaintiff's decedent was a proximate cause of the alleged injury. MCL 600.6304(1) requires that the jury make findings indicating the total amount of the plaintiff's damages and that the jury assign a percentage of fault to all persons that contributed to the injury. Fault is defined in subsection 8 of MCL 600.6304 to include an act or omission that is a proximate cause of damage sustained by a party. Thus, whether the negligence of the decedent occur prior to or after the treatment at issue is irrelevant. If the jury finds such negligence causally related to the injuries alleged, it is required, under the current statutory scheme, to assign a percentage to such negligence.

2. The provisions of sections 2957, 2959, 6304 and 6306 are consistent with the common law governing comparative negligence and causation.

In Placek v Sterling Heights, 405 Mich 638; 275 NW2d 511 (1979), this Court adopted the pure form of comparative negligence (since codified in section 2959). In so concluding, the Placek Court cited to and quoted the extensive discussion by Justice Williams in Kirby v Larson, 400 Mich 585; 256 NW2d 400 (1977), a 3 to 3 decision, where Justice Williams stated:

> The doctrine of pure comparative negligence does not allow one at fault to recover for one's own fault, because damages are reduced in proportion to the contribution of that person's negligence, whatever that proportion is. The wrongdoer does not recover to the extent of his fault, but only to the extent of the fault of others. To assume that in most cases the plaintiff is more negligent than the defendant is an argument not based on equity or justice or the facts. **What pure comparative negligence does is hold a person fully responsible for his or her acts and to the full extent to which they cause injury. That is justice.** [400 Mich 585, 644; emphasis added.]

Citing to the balance between causation and liability struck in Placek, supra, this Court in Brisboy v Fibreboard Corp, 429 Mich 540, 555-556; 481 NW2d 650 (1988) recognized that the principles behind the adoption of a comparative negligence system include "allowing a court to be more 'even -handed' with the application of proximate cause concepts in regard to both plaintiffs and defendants" as well as that the "defendant should only be held liable for damages causally related to its negligence."

Although decided when the contributory negligence of a plaintiff could bar the action, the statements by this Court in Wiles v New York Cent R Co, 311 Mich 540, 551; 19 NW2d 90 (1945) are further instructive:

> Though plaintiff's negligence may not be **the** proximate cause, it

> is contributory negligence if it contributes to the cause. Contributory negligence is negligence of the plaintiff which operates with the negligence of the defendant in producing the injury. Where there is contributory negligence, the plaintiff's negligence, combined with the defendant's negligence, is the proximate cause of the injury. The negligence of each may be a proximate cause, but neither can be the cause of sole cause. Contributory negligence necessarily implies negligence on the part of the defendant. The theory is that the defendant's negligence causes the injury and the plaintiff's negligence contributes to it. [Quoting Rockwell v Railway Co, 253 Mich 144, 150-151; 234 NW 159 (1931); emphasis added.]

The causal connection between any party's negligence (be it the plaintiff's, the defendant's or a non-party's) has always been a function of the trier of fact. Plaintiff has the burden to establish the causal connection between the defendant's negligence and the claimed injury, as is the burden on defendant to establish the causal connection between the plaintiff's negligence and the claimed injury. See Glinski v Szylling, 358 Mich 182, 201-202; 99 NW2d 637 (1959). Where evidence is presented or could be presented, the issue is one for the trier of fact. By ruling as the trial court and Court of Appeals did here, the lower courts essentially took this function out of the jury's hands – contrary to the statutory requirements of MCL 600.2959 and MCL 600.6304.

As discussed above, it is well settled that more than one act of negligence may contribute to an injury.

> There may be two contributing causes of an injury. Where injury results from concurrent negligence of two or more persons, each proximately contributing to the result, recovery may be had against one or more. It is not essential to recovery that defendants' negligence be the sole cause of plaintiff's injury. There may be two proximate causes of an accident. [Gleason v Hanafin, 308 Mich 31, 37; 13 NW2d 196 (1944); citations omitted; See also Barringer v Arnold, 358 Mich 594, 599; 101 NW2d 365 (1960).]

In Brisboy, supra this Court addressed the causal connection between the plaintiff's alleged comparative negligence and the injury. In that products liability action, the plaintiff brought suit for wrongful death in connection with the lung cancer death of an asbestos worker. The issue presented at trial was whether and to what extent exposure to asbestos and the decedent's long-term use of cigarettes were causally related to the cancer. Id. at 544. Recognizing that there may be more than one proximate cause of an injury, this Court stated:

> Liability does not attach unless an actor's negligent conduct is a proximate or legal cause of the harm suffered. The facts of this case illustrate the principle that there may be more than one proximate cause of an injury. As this Court recognized in *McMillian v. Vliet*, 422 Mich. 570, 577, 374 N.W.2d 679 (1985), "[t]wo causes frequently operate concurrently so that both constitute a direct proximate cause of resulting harm." [429 Mich at 547 - 548; citations omitted.]

Noting that the proximate cause or causes of the decedent's lung cancer was a question of fact for the jury, this Court in Brisboy further held that the risk of developing lung cancer was within the scope of risk assumed by a smoker and that if there was a finding of proximate cause the negligence of the parties had to be compared:

> We hold that the risk of developing lung cancer is within the scope of the risk assumed by a smoker, whether or not the risk is enhanced by other factors. So long as there is a finding of proximate cause in each case, the negligence of the parties must be compared. We reject plaintiff's claim that there is no rational basis for the jury's apportionment of fault and note that juries are frequently called upon to make such judgments. [429 Mich at 552.]

In this asbestos lawsuit, the Court did not limit the jury's consideration of the plaintiff's smoking habits (his comparative negligence) to the time period "after" the alleged exposure to asbestos. Rather, the Brisboy Court properly held that the issue of proximate cause was one for

the trier of fact to decide. Similarly in a medical malpractice case, the risks that a patient with hypertension runs with failing to follow her doctor's instructions including taking prescribed medication (whether such risk is enhanced by other factors) is one for the trier of fact.

This Court recently cited with approval to the discussion on proximate cause in Stoll v Laubengayer, 174 Mich 701, 706; 140 NW 532 (1913). See Robinson v City of Detroit, 462 Mich 439, 462; 613 NW2d 307 (2000). The plaintiff in Stoll brought suit for the wrongful death of a child injured while sledding. Evidence was introduced that the child lost control of the sled and was carried down a path under the defendant's wagon, resulting in injury and death. The plaintiff claimed that the defendant was negligent in standing his team of horses over the path. Holding that the proximate cause of the accident was the child's acts, and not the defendant's, the Stoll Court stated that an "injury caused by negligence, and an accident not being prevented by negligence, are very distinct in operation and effect." Id. at 705, quoting Beall v Twp of Athens, 81 Mich 536; 45 NW 1014 (1890).

Recognizing that the definition of proximate cause often is determined by the particular facts involved, the Stoll Court held that the proximate cause was the act of the child:

> It is, we believe, obvious that the act of defendant in permitting his team to stand over the path in question (conceding such act to have been wrongful and negligent) was not, within the reasoning of our own decisions, the proximate cause of the injury to plaintiff's intestate. The immediate cause is found in the act of the child herself, who voluntarily started her sleigh down the incline. But for this act of hers no accident could have occurred. Whether she voluntarily followed the diagonal path, or her sleigh took that course against her will, is a matter of no consequence, though the testimony fairly leads to the conclusion that her course down the path was brought about against her will, 'because she lost control.' Whether willful or accidental, it was still proximate - - the immediate efficient, direct cause preceding the injury.

In adapting the comparative negligence provisions in section 2959, the Legislature has reaffirmed and codified the comparative negligence principles established in the common law. The Legislature has further clearly evidenced its intent that every person whose negligence contributed to the injury will be held responsible. The statutes require the jury to make the determination of each party and non-party's negligence and to assign a percentage to such negligence, which percentage is then used in allocating liability for damages. There is no temporal time limit in the statutes or at common law.

The Tennessee case of Gray v Ford Motor Co, 914 SW2d 464 (Tenn, 1996) is further instructive. In Gray, the decedent was involved in a motor vehicle accident and received emergency room treatment and surgery for the removal of a ruptured spleen. However, the treatment was not successful and the decedent died. Plaintiff filed suit alleging that the death was proximately caused by a defective and unreasonably dangerous passenger restraint system in the vehicle manufactured by Ford Motor Company, as well by the negligence of the doctor who treated the injury. Id. at 466. The jury found Ford Motor Company without fault, but found the medical treater and the decedent (in the operation of the vehicle) to both be negligent. The Tennessee Supreme Court rejected the plaintiff's contention that the decedent's comparative negligence in causing the accident should not have been considered, stating:

> In the present case, the decedent's negligence caused the accident and incidental thereto, the ruptured spleen. The physician negligently failed to diagnose the injury. Death resulted. There was one indivisible injury proximately caused by the separate, independent acts of the plaintiff and the physician. Had the injury been caused by the separate, independent negligent acts of the physician and another tort feasor, the liability of each would be determined by the fault attributed to each. The principle is the same where the negligence of the plaintiff is a contributing proximate cause. [Id. at 467.]

So too here was there one indivisible injury. It was for the jury to apportion fault among all parties and non-parties. This requirement applies regardless of whether the prior acts were committed by the plaintiff's decedent, another defendant, or a non-party. The current statutory scheme requires such apportionment.

3. The Court of Appeals improperly ignored the statutory scheme adopted by the Legislature in 1995 choosing instead to rely upon pre- 1995 case law and out of statute cases.

The Court of Appeals specifically recognized that the 1995 tort reform legislation supports the defendant's position:

> There is some appeal to defendants' claims that under the 1995 tort reform legislation, any fault on the part of a plaintiff (or, in this case, a decedent) should be apportioned. Indeed, MCL 600.6304(1)(b) indicates that a jury shall make findings with respect to "[t]he percentage of the total fault of all persons that contributed to the death or injury, including each plaintiff . . . ." Clearly, a person who does not follow her doctor's orders and who therefore maintains a high blood pressure is contributing to her own death. [Appendix p 262A-263A.]

Nonetheless, the Court of Appeals rejection the explicit application of the statutes to instead follow "(1) the implications of *Podvin*, (2) the holdings of the majority of jurisdictions, and (3) the rationale expressed in other jurisdictions and in the Restatement" (Appendix p 263A). Such cases were not decided in the context of Michigan's comparative negligence and allocation of fault statutes and thus are not controlling. In relying on these statute, the Court of Appeals rendered a decision contrary to the statutory construction rules followed by this Court: to apply the clear and unambiguous terms of the statute to the circumstances in the case. It was improper for the Court of Appeals to rely on principally out of statute case law rather than the terms of MCL 600.2959 and MCL 600.6304.

Further, the cases relied upon by the Court of Appeals are not in essence contrary to the law adopted by our Legislature. Under MCL 600.2957, 600.2959 and 600.6304, the jury is charged with determining the percentage of fault of the decedent (as well as all defendants and other non-parties) that caused the injury or death alleged. Fault is further defined under section 6304(8) to include "an act, an omission . . . that is a proximate cause of damages sustained by a party." Thus, under our statutory provisions, the jury must determine what damages where proximately caused by each and every party (as well as non-parties). The true difference with the cases relied upon by the Court of Appeals is the factual scenarios involved.

In all of the cases cited and relied upon by the Court of Appeals, the plaintiffs' alleged negligence resulted in an "injury" for which the plaintiffs sought treatment. In Podvin v Eickhorst, 373 Mich 175; 128 NW2d 523 (1964), Martin v Reed, 200 Ga App 775; 409 SE2d 874 (1991) and Rowe v Sisters of the Pallottine Missionary Society, 211 W Va 16; 560 SE2d 491 (2001), the plaintiffs were injured in automobile and/or motorcycle accidents and claimed that the treatment subsequently received for those injuries was negligent. In Harding v Deiss, 300 Mont 312; 3 P3d 1286 (2000) the plaintiff, who had asthma and was allergic to horses, collapsed while horseback riding. In Harvey v Mid-Coast Hosp, 36 F Supp2d 32 (D Me 1999), the plaintiff attempted suicide.

In all of these cases the jury was charged with determining the "damage" caused by the defendant's negligence, versus the plaintiff's condition at the time treatment was sought. The defendants were not at "fault" as to the initial injury and thus, under Michigan law, could not be charged with any damages or injury resulting from the plaintiff's negligent acts in causing the initial injury. This distinction was implied recognized by the court in Martin, supra, (also an

automobile accident case with subsequent alleged negligent medical treatment):

> The evidence did not demand a finding of appellees' subsequent malpractice, and the jury would have been authorized to find that the original automobile wreck was the sole proximate cause of appellant's paralysis. However, the evidence likewise did not demand a finding of appellees' conformity to the applicable standard of care, and the jury would have been authorized to find that their subsequent malpractice was the sole proximate cause of appellant's paralysis. What the jury would *not* have been authorized to find is that, although appellees' subsequent treatment and diagnosis did constitute malpractice, a recovery therefor was barred because the original automobile wreck had been caused by appellant. [409 SE2d at 877.]

Thus, in the above cases, while the patient/plaintiff's negligence caused an injury (an automobile accident or a suicide attempt), there was alleged negligence in the care and treatment that followed, which the plaintiff argued caused further, additional injury. The jury would be required to award damages only for the damage caused by the defendant health care provider, as distinguished from the injury caused by the initial negligence for which the treatment was sought.

In this case, the decedent's injury did not occur until her fatal stroke on April 16, 1995. Thus, her behavior in failing to take her blood pressure medication and in seeking appropriate follow up care with her personal physician in the years prior to April of 1995, as well as subsequently, could be found by the jury to be a proximate cause of the stroke and ultimate death. It was for the jury to determine what damages were proximately caused by Mrs. Shinholster's negligence versus damages that were caused by the alleged negligence of these defendants.

Such was impliedly recognized by the Court of Appeals in Colbert v Primary Care Medical, P.C., 226 Mich App 99; 574 NW 2d 36 (1997) wherein the plaintiff brought a medical malpractice action alleging a failure to accurately and timely diagnose the decedent's acute hemorrhagic pancreatitis. The facts revealed that the decedent was an alcoholic and that when

he was seen by the defendant, various tests were ordered. However, the following day, the decedent's wife called the doctor to report that the decedent was still in pain, vomiting and acting strange, and that the doctor advised her to take the decedent to the hospital. The decedent subsequently suffered a cardiopulmonary arrest and died. 226 Mich App at 101. The Court of Appeals rejected the argument that the jury should not have been instructed regarding the decedent's comparative negligence to heed the warning of the doctor to stop drinking:

> Plaintiff next argues that the trial court erred in instructing the jury on comparative negligence based on Dr. Shavell's warning to the decedent to stop drinking when the veracity of defendant Shavell and the reliability of the medical records were seriously in question. . . .
>
> First, the basis of plaintiff's challenge is that the evidence on this issue was not credible. However, it is for the jury to determine credibility. That is, the instruction was relevant only if the jury found the underlying evidence to be credible. If the jury rejected the evidence, then it would act accordingly under the instruction. Furthermore, even if error occurred, the error was harmless. Comparative negligence is relevant to the issue of damages, an issue not reached in this case. [Id. at 103-104.]

D. There was considerable evidence of the decedent's negligence.

Considerable evidence was presented at the time of trial that a proximate cause of the decedent's condition, beginning no later than April 7, 1994 and continuing through to April 16, 1995, the date of the stroke and her death in August of 1995, was due to the decedent's negligence in failing to heed her doctor's instructions, including the taking of blood pressure medication to control her hypertension in the year (if not years) prior to her visit to Annapolis Hospital on April 7, 1995 and that such negligent behavior was a cause of her stroke on April 16, 1995.

The decedent's personal physician, Dr. Vicencio, testified that contrary to instructions and recommendations, the decedent failed to take the medications prescribed by Dr. Vicencio to bring

her blood pressure under control in the year prior to April 7, 1995. The emergency room visit which initiated Dr. Vicencio's care in April of 1994 was due to her hypertension and even then the decedent acknowledged that she had not been taking medicine prescribed to control her high blood pressure. Further, Dr. Vicencio testified that the decedent repeatedly failed to return for follow up visits within the time requested by Dr. Vicencio or even at all. Further, although Dr. Vicencio requested that the decedent return two weeks after the last visit of September 9, 1994, so that her blood pressure could be monitored and treated if still too high, the decedent did not return. Apparently, the decedent failed to secure medical care from any other provider until the emergency room visits, the following year, in April of 1995.

Johnnie Shinholster, the decedent's husband, testified that his wife did not see any other physician in place of Dr. Vicencio (Appendix p 101A). Mr. Shinholster also admitted, when faced with his prior deposition testimony, that when his wife felt good, she would not take her blood pressure medication (against her doctors' orders) (Appendix pp 100A and 104A-111A).

E. Expert testimony existed to establish that the negligence of the decedent was a proximate cause of the decedent's death.

Among the expert testimony presented at trial by defendants was that from Bradford L. Walters, M.D., a board certified emergency medicine specialist. Dr. Walters testified that the decedent had a duty to take her medications as prescribed and to see her family physician as recommended by her emergency care physician (Appendix p 173A.) Dr. Walters testified that, assuming the decedent maintained her normal habit and routine of only taking her medication when she didn't feel well, her failure to take the Procardia as prescribed from April 7 through April 16, 1995 was a proximate cause of her stroke and ultimate death (Appendix pp 173A-174A) However, he went further to explain:

> One of the worst things that can happen to a patient who has high blood pressure is to take their medication intermittently. The blood pressure comes down. The medication wears off. The blood pressure soars up. The blood pressure comes down. If and when they take it again, it's sort [sic of] like a hammer hit to the brains each time that happens.
>
> When blood pressure medications are taken on a regular basis there's a much smoother lowering of blood pressure and you don't get those spikes up and down and up and down.
>
> Those spike up and down can possible cause what happened to Mrs. Shinholster and a stroke like this. [Appendix pp 173A-174A]

Dr. Walters stated that he believed Mrs. Shinholster's failure to take her medicine and follow up with Dr. Vicencio contributed to her stroke (Appendix pp 154A-155A)

The trial court ruled that the defendants would be limited to asking questions of the witness in regards to the decedent's non-compliant behavior and the possible effect of such negligence over the objections of defendants.

> Mr. Rinkel: I'm not sure where Ms. Susskind [plaintiff's counsel] is going with this. She doesn't want this testimony to come in.
>
> There is no prohibition from me talking about or getting evidence that this woman was non-compliant and may have breached her duty of compliance even prior to April 7th, 1995.
>
> * * *
>
> I am certainly entitled to ask this witness foundational questions about her prior non-compliance to see if that relates. And I am certainly entitled to ask him questions about the time of transient – seems to be at issue here which is the 7th, 10th and the 14th. [Appendix p 141A.]

Similarly, trial counsel for Annapolis Hospital was denied the opportunity to ask questions regarding the decedent's non-compliant behavior and the causal link with the stroke and ultimate death:

> Mr. Dolenga: We want to ask him the same questions as to whether he believes she had an obligation to follow up with Dr. Vicencio or follow up in September of 1994 when she didn't, follow up with her family doctor at that point, take her medications, and whether he believes that was also a proximate cause of her death. [Appendix p 167A.]

Such request was denied (Appendix p 168A).[6]

F. Conclusion

The jury should have been allowed to consider whether the injury was proximately caused by the separate, independent act of the plaintiff's decedent in failing to follow and heed her doctor's advice regarding the taking of her medication and seeking treatment, as well as the emergency room physicians who saw her a year later. If the stroke was caused by the separate and independent negligent acts of these doctors or even another tortfeasor (such as in the case of an automobile accident), the liability of each would be determined by the fault attributed to each. There is no limitation in the Michigan comparative negligence statute which provides that the

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[6] In response to the application filed with this Court, plaintiff's counsel improperly characterized the testimony of defendant's experts. Contrary to statements in plaintiff's response brief to the application, defendants' experts did not testify that if the decedent had been hospitalized and anti-coagulation therapy administered, the decedent would not have died. Rather, these experts in response to such questions on cross examination simply stated that "there was that possibility"(Appendix p 177A) or that it was possible that anticoagulation therapy may have been of some benefit or that she may have survived (Appendix pp 130A, 134A-135A, 137A).

comparative fault of the plaintiff in a medical malpractice action prior to the time she sought treatment by the defendants can not be considered by the jury. The Court of Appeals and the trial court erred in grafting such a limitation onto the Michigan comparative negligence statute.

Evidence was presented by defendant both as to such negligence and proximate cause and further evidence would have been introduced and elicited if allowed by the trial court. The jury was improperly precluded from considering the negligence of the decedent prior to the treatment at issue. Such error cannot be considered harmless.

Based on the evidence that was presented, and further evidence that could have been presented, it can only be concluded that a jury could have found that the decedent was negligent prior to April 7, 1995 and that such negligence was a cause of the fatal stroke. The trial court's limitation on the admission of evidence and its instructions to the jury were erroneous and inconsistent with substantial justice and not harmless error.

II. The exceptions which allow application of the higher tier of the non-economic damages cap do not apply where the patient is deceased at the time the verdict is rendered and the judgment entered.

The lower tier of the non-economic damages cap in MCL 600.1483 should have been applied in this case, as none of the exceptions which trigger the application of the higher cap apply. Based on the clear and unambiguous language of the cap statute, the exceptions for application of the higher tier only apply if the injured patient is currently living at the time of entry of the verdict and judgment. This action was brought under the wrongful death act by the "estate of Betty Shinholster." The patient was deceased at the time the action was filed, at the time the verdict was rendered and at the time the judgment was entered. Under the cap statute, the exceptions must be deemed satisfied at the time the verdict and judgment is entered for the higher

tier cap to apply. Such is dictated by the temporal point fixed by the statute as well as the cap statute's use of the present tense in the provisions outlining the exceptions.

A. Standard of review and how issue was preserved.

Issues of statutory construction are questions of law and are thus reviewed de novo. Robertson v Daimler Chrysler Corp, 465 Mich 732, 739; 641 NW2d 567 (2002). Defendants raised the issue of the inapplicability of the higher tier cap at trial and in post-trial motions (Tr of 9/13/99, pp 10 - 25 and Tr of 2/11/00 pp 5 - 10).

B. Introduction to the cap statute.

A cap on non-economic damages in medical malpractice actions was first adopted by the Legislature in 1986 PA 178. This prior version provided that a cap on non-economic damages in the amount of $225,000 (to be adjusted annually by the Consumer Price Index ("CPI")) would be applied unless one of seven exceptions applied. These exceptions included *death*, as well as an intentional tort, a foreign object wrongfully left in the body of the patient, an injury involving the reproductive system of the patient, discovery of the existence of the claim prevented by fraudulent conduct, a limb or organ was wrongfully removed and loss of a vital bodily function (pertinent statutory provisions including the 1986 version of MCL 600.1483 are attached as Addendum B).

Subsequently, in 1993 PA78, the Legislature decided to revise and amend the cap statute eliminating several of these seven exceptions, including the exception for death. The cap on non-economic damages in medical malpractice actions set forth in MCL 600.1483, as amended by 1993 PA 78, provides for a two tier cap on non-economic damages in medical malpractice actions. Section 1483 limits non-economic damages in medical malpractice actions to

$280,000.00 (again adjusted yearly by the CPI), with three exceptions to which a higher tier $500,000.00 (also adjusted yearly by the CPI) is applicable (Addendum A). Section 1483(1) provides:

> (1) In an action for damages alleging medical malpractice by or against a person or party, the total amount of damages for non-economic loss *** recoverable by all plaintiffs, resulting from the negligence of all defendants, shall not exceed $280,000.00 unless, as a result of the negligence of 1 or more of the defendants, 1 or more of the following exceptions apply as determined by the court pursuant to section 6304, in which case damages for non-economic loss shall not exceed $500,000.00:
>
> > (a) The plaintiff is hemiplegic, paraplegic, or quadriplegic resulting in a total permanent functional loss of 1 or more limbs caused by 1 or more of the following:
> >
> > (i) Injury to the brain.
> >
> > (ii) Injury to the spinal cord.
> >
> > (b) The plaintiff has permanently impaired cognitive capacity rendering him or her incapable of making independent, responsible life decisions and permanently incapable of independently performing the activities of normal, daily living.
> >
> > (c) There has been permanent loss of or damage to a reproductive organ resulting in the inability to procreate. [Addendum A.]

As set forth above, the current version of section 1483 provides that the non-economic damages recoverable in a medical malpractice action shall not exceed $280,000.00 (adjusted yearly by the CPI) unless one of three exceptions applies.[7] Those three exceptions are: (1) injury

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[7] The cap amount that existed at the time this cause of action arose as adjusted by the Consumer Price Index was $298,052.00.

to the brain or spinal cord, causing some form of plegia, (2) permanent impairment of cognitive capacity, or (3) damage to a reproductive organ resulting in an inability to procreate.

C. Based on the clear and unambiguous language of the cap statute, the lower tier clearly applies where the patient is deceased at the time the verdict is entered.

In this case, death ensued before the case was filed and proceeded to trial and verdict. Because the action was one of wrongful death at the time the verdict was entered, the exceptions which allow application of the higher tier cap do not apply. Such is evidenced from the Legislature's use of "present tense" in the provisions of section 1483 governing the exceptions for application of the higher tier cap, as well as the temporal point fixed by MCL 600.6098.

> When faced with questions of statutory interpretation, our obligation is to discern and give effect to the Legislature's intent as expressed in the words of the statute. We give the words of a statute their plain and ordinary meaning, looking outside the statute to ascertain the Legislature's intent only if the statutory language is ambiguous. . . .When parsing a statue, we presume every word is used for a purpose. As far as possible, we give effect to every clause and sentence. [Pohutski v City of Allen Park, 465 Mich 675, 683-684; 641 NW2d 219 (2002).]

The Legislature drafted the cap statute in the present tense, using the word "is" and "has" in the exceptions: "Plaintiff **is** hemiplegic, paraplegic, or quadriplegic resulting in a total permanent functional loss of one (1) or more limbs . . . .", "The plaintiff **has** permanently impaired cognitive capacity . . . . ," and "There **has** been permanent loss of a damage to a reproductive organ . . . . [MCL 600.1483.]

By use of "is" the "third person singular **present** tense" as well as "has," the Legislature has indicated that the plaintiff must presently have such conditions. As this Court recently recognized, the use of a verb tense by the Legislature is significant in construing statutes.

Michalski v Revven Bar-Levav, 463 Mich 723, 733; 625 NW2d 754 (2001), see also United States v Wilson, 503 US 329, 333; 112 S Ct 1351; 117 L Ed 2d 593 (1992); United States v Valentine, 63 F3d 459, 463 (CA6 1995).

The provisions of MCL 600.6098 also evidence the intent of the Legislature that the relevant point in time is when the verdict was rendered or when the judgment was entered. Section 6098 provides that the cap is applied **after** the jury has rendered its verdict:

> A judge presiding over an action alleging medical malpractice shall review each verdict to determine if the limitation on noneconomic damages provided for in section 1483 applies. If the limitation applies, the court shall set aside any amount of noneconomic damages in excess of the amount specified in section 1483. [See Addendum A.]

Similarly, section 6304(5) also provides for application of the cap and a determination of what cap limit applies "after" the jury returns a verdict:

> In an action alleging medical malpractice, the court shall reduce an award of damages in excess of 1 of the limitations set forth in section 1483 to the amount of the appropriate limitation set forth in section 1483. The jury shall not be advised by the court or by counsel for either party of the limitations set forth in section 1483 or any other provision of section 1483.

Thus, pursuant to the explicit provisions of section 6098, the court determines whether the limitations on noneconomic damages apply after the verdict is rendered by the jury. If the trial court finds such a limitation applicable, the statute requires that the judge "set aside any amount of noneconomic damages in excess of the amount specified in section 1483." Thus, the Legislature has determined the time when the cap is to be applied is after the jury has rendered a verdict. At that time the trial court must determine if the cap applies and, if so, which cap tier is applicable. The time period for application of the cap is thus, based on this clear statute, after

the jury's verdict.

This temporal point, after the rendering of a verdict, is linked to the Legislature's use of the present tense in the provisions governing the exceptions which must be met for application of the higher tier cap. By use of the present tense in such provisions, the Legislature has evidenced its intent that the time to determine whether such exceptions can be met is at the time the verdict is rendered and judgment is to be entered.

In response to the application, plaintiff attempted to place the temporal frame of reference to be at the time of the defendant's alleged negligence, focusing on the opening paragraph of section 1483 which provides:

> In an action for damages alleging medical malpractice by or against a person or party, the total amount of damages for non-economic loss *** recoverable by all plaintiffs, resulting from the negligence of all defendants, shall not exceed $280,000.00 unless, *as a result of the negligence of 1 or more of the defendants,* 1 or more of the following exceptions apply as determined by the court pursuant to section 6304, in which case damages for non-economic loss shall not exceed $500,000.00 [MCL 600.1483(1); emphasis added.]

Such phrase does not supply a temporal frame of reference but rather simply provides that the injuries, even if technically within the exception, must have been "caused" by the negligence of the defendants. If the patient is "hemiplegic, paraplegic, or quadriplegic resulting in a total permanent functional loss of one (1) or more limbs for periods," or "has suffered permanently impaired cognitive capacity," or has suffered "permanent loss of a damage to a reproductive organ," such injuries must have been proximately caused by the defendant's alleged negligence. This statutory requirement addresses "proximate cause" not the temporal framework for application of the exceptions.

In relying on these words, plaintiff ignored the words which followed: "as determined by the court pursuant to section 6304." As discussed above, under MCL 600.6304 and MCL 600.6098, the court determines the applicability of the exceptions for application of the higher tier cap "after" the verdict is rendered. This is the time reference relevant to determining which tier of the cap applies.

Such is consistent with the provisions of the wrongful death act, MCL 600.2922. This statutory provision makes clear that the damages recoverable in a wrongful death action may be different than those which could have been recovered if the patient had survived:

> In every action under this section, the court or jury may award damages as the court or jury shall consider fair and equitable, under all the circumstances including reasonable medical, hospital, funeral, and burial expenses for which the estate is liable; reasonable compensation for the pain and suffering, while conscious, undergone by the deceased person during the period intervening between the time of the injury and death, and damages for the loss of financial support and the loss of the society and companionship of the deceased.

Under that statute, where the patient dies after a suit is filed and plaintiff's claim then includes that death was caused by the alleged negligent acts of the defendant, the action must be amended to be brought under the wrongful death act. Damages recoverable under the wrongful death act can be different than those recoverable where death has not ensued. For instance, if a patient/plaintiff lives, he or she may recover for lost wages/earning capacity.[8] However, where death **occurs prior to verdict**, the estate is limited to "loss of financial support" (in addition to loss of society and companionship). See Baker v Slack, 319 Mich 703; 30 NW2d 403 (1948)

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[8] Of course, if the death is not related, the plaintiff's claims of loss wages would be limited to the date of death as any future loss would not be caused by the defendant's alleged negligence.

(loss recoverable by family members does not extend to future hope of inheritance or lost wages of the decedent, but only to financial support proven to have been given or reasonably expected). Further, loss of society and companionship can be recovered by family members who would not have claims for the analogous loss of consortium if the patient had lived. See Sizemore v Smock, 430 Mich 283; 422 NW2d 666 (1988). Thus, the Legislature's decision to restrict the higher tier cap to those patients who are living at the time of the verdict and judgment is consistent with the changes to the damages recoverable when an action is brought pursuant to the wrongful death statute.

In response to the application, plaintiff improperly characterized the analysis of this Court in Michalski, supra. While plaintiff was correct that this Court addressed the impact of the tense of the verbs in question, ruling that the "present" tense referred not to events existing as of the time of trial, but to events existing during the employment of the plaintiff in Michalski, plaintiff failed to inform this Court that this was due to a correct reading of the statute in question. That statute was the Handicapper Civil Rights Act (HCRA) which provides that "[a]n employer shall not . . .[d]ischarge or otherwise discriminate against an individual . . . because of a handicap that is unrelated to the individual's ability to perform the duties of a particular job or position." 463 Mich at 730, citing MCL 37.1202(1)(b). Further, the HCRA defines handicap for employment related purposes as a determinable physical or mental characteristic which "substantially limits 1 or more of the major life activities" or as "[b]eing regarded as having a determinable physical or mental characteristic." 463 Mich at 730 - 731, citing MCL 37.1103(e). Thus, HCRA specifically provides that the physical or mental characteristic must be evaluated as it existed or was perceived at the time of employment. Such a holding is not inconsistent with the reading

defendant submits is mandated here. Here the Legislature has also set the time when the cap's tier exceptions must be evaluated and determined to exist. Such is the time after the jury's verdict, when the trial court enters the judgment.

The Legislature specifically used the present tense when referencing the conditions which must exist for the higher tier of the damages cap to apply. Further, the Legislature has provided that the time to determine the applicability of the non-economic damages cap, and which tier applies, is after the jury has rendered the verdict. Thus, by fixing the temporal point after the verdict and using the present tense in the cap statute itself, the Legislature has unambiguously set forth its intention that the patient be alive at the time the damages are awarded. As a result, where death ensues prior to the verdict, the lower tier cap in MCL 600.1483 applies.

D. The Legislature specifically rejected as an exception to the lower tier of the non-economic damages cap injuries which result in death.

While defendant submits that the language of section 1483 clearly and unambiguously requires application of the lower tier cap in this wrongful death action, even if the action is found to be ambiguous by this Court, the legislative history reveals that the Legislature intended the lower tier cap to apply in death actions. Prior to the adoption of the 1993 version of the cap statute, several attempts were made by some House Representatives and/or Senators to include death as an exception to the lower cap. Attached as Addendum C are several excerpts of the journals where various Legislators proposed changes to the cap, including a death exception. No such exception was adopted by the legislative body as a whole. See In re Brzezinski, 214 Mich App 652, 665; 542 NW2d 871 (1995), rev'd on other grounds 454 Mich 890; 562 NW2d 785 (1997), Dept of Transp v Thrasher, 196 Mich App 320, 323; 493 NW2d 457 (1992), aff'd 446 Mich 61; 521 NW2d 214 (1994) (a court may consider journals chronicling legislative history and

the changes in the bill during its passage).

Excerpts of the Senate Journal for the Legislative Session held on June 29, 1993 are excellent examples that the Legislature understood and intended that the lower tier damages cap would apply to claims for wrongful death. For example, then Senator Kelly, strenuously protested the changes to section 1483 in the 1993 Tort Reform Act, specifically referencing the fact that death is no longer one of the second tier injuries under this legislation, stating that he believed such would impact the fundamental rights of that person:

> We have done something in this legislation that hadn't been contemplated in previous attempts. This is ludicrous on its face. Madam President **death is no longer one of those second-tier offenses under this legislation.** It becomes a minor consideration in the course of a physician's malpractice, so that even though the person, even though that doctor had a duty that was owed to that particular victim. And even though the doctor may have breached that duty and it results in that person's death, we've now eliminated them from due process that would normally be available to anyone else in our judicial system. [See Addendum D; emphasis added.]

Clearly, Senator Kelly recognized the Legislature's intent was to remove death as an exception to applying the lower tier cap and that, not only the damage cap statute as a whole, but the lower cap would apply to death cases. In addition, attempts were made after the 1993 act was passed to again add "death" as an exception to the cap on non-economic damages, but such proposed amendment exception was also rejected. (See House Journal, April 27, 1995 attached hereto as Addendum E). These excerpts clearly indicate that the Legislature considered which damages cap should apply to wrongful death claims. Equally evident is that the Legislature clearly and unambiguously rejected such a "death" exception to the lower tier cap.

In adopting the tort reform provisions in 1993, 1993 PA 178, it is clear that the Legislature wished to eliminate frivolous lawsuits and decrease the amount of non-economic damages recoverable for the purpose of decreasing the cost of medical malpractice insurance. It was the Legislature's belief that the current system promoted litigiousness and resulted in the high cost of insurance, resulting in a negative effect on health care in this state:

> Using survey results and anecdotal evidence, critics of the current system maintain that litigiousness and the high cost of insurance in Michigan drive out physicians, either literally out of the state, or out of practice through early retirement; many other physicians choose to remain in practice, but eliminate costly elements such as obstetrics that carry a comparatively high risk for lawsuits ($1 million per occurrence/$3 million aggregate obstetrical coverage in Detroit area costs $134,000 annually; for $100,000/$300,000 coverage, the annual cost is $63,000). The medical liability climate thus is held partly responsible for problems that people in urban centers and rural areas have in obtaining medical care, as well as responsible for increasing health care costs by forcing physicians to practice "defensive medicine." [House Legislative Analysis section, p 1, attached as Addendum F.]

Applying the higher tier of the cap in a case such as this, where death occurred prior to the filing of the suit and prior to the jury verdict, would not further the Legislature's purpose behind the cap statute. The Legislature specifically declined to include a death exception.

E. Plaintiff waived any argument that the cap does not apply in death cases.

Recently, the Court of Appeals issued a decision in Jenkins v Patel, 256 Mich App 112; 662 NW2d 453 (2003), lv gtd __ Mich __ ; 671 NW2d 538 (203) holding that the damages cap in MCL 600.1483 does not apply in actions brought under the wrongful death statute, MCL 600.2922. However, as the Court of Appeals recognized in this case, plaintiff never argued that the damages cap in MCL 600.1483 does not apply in wrongful death actions (Appendix p 267A).

It is well established that an issue not raised below is waived on appeal. See Napier v Jacobs, 429 Mich 222, 227-228; 414 NW2d 862 (1987).[9]

III. The trial court erred in not reducing future damages in this death case to their present value regardless of the age of the decedent at the time of the death or the age of the personal representative.

Since the patient was deceased at the time of the filing of the complaint, the provisions of MCL 600.6311, which exempts the reduction to present value to plaintiffs over 60 years of age at the time of judgment, do not apply. Both the trial court and the Court of Appeals erred in construing the statute to allow for a non-reduction to present value of future damages in a wrongful death action.

A. Standard of review and how issue was preserved.

Issues of statutory construction are questions of law and are thus reviewed de novo. Robertson v Daimler Chrysler Corp, 465 Mich 732, 739; 641 NW2d 567 (2002). The issue was raised after the verdict (Tr of 2/11/00, pp 7 - 11).

B. In this wrongful death action, the "60 years of age" exception in MCL 600.6311 does not apply to preclude reduction of damages given to the decedent's heirs.

MCL 600.6306 provides that future economic and non-economic damages, less medical care costs, be reduced to present cash value:

> (1) After a verdict rendered by a trier of fact in favor of a plaintiff, an order of judgment shall be entered by the court. Subject to

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[9] Defendant does not waive its position that the cap is applicable in wrongful death actions and the Jenkins decision was wrongfully decided. In the event that this Court may consider the issue, even though not properly raised by plaintiff, defendant requests that this Court allow defendant to brief the issue.

> section 2959, the order of judgment shall be entered against each defendant, including a third-party defendant, in the following order and in the following judgment amounts:
>
> (a) All past economic damages, less collateral source payments as provided for in section 6303.
>
> (b) All past noneconomic damages.
>
> (c) All future economic damages, less medical and other health care costs, and less collateral source payments determined to be collectible under section 6303(5) reduced to gross present cash value.
>
> (d) All future medical and other health care costs reduced to gross present cash value.
>
> (e) All future noneconomic damages reduced to gross present cash value.
>
> (f) All taxable and allowable costs, including interest as permitted by section 6013 or 6455 on the judgment amounts. [See Addendum A.]

An exception to the reduction of present value under this section exists in MCL 600.6311, which states that section 6306 only applies to "plaintiffs" who are 60 years of age or older at the time of the judgment:

> Sections 6306(1)(c), (d), and (e), 6307, and 6309 do not apply to a plaintiff who is 60 years of age or older at the time of judgment. [See Addendum A.]

In its opinion, the Court of Appeals held that there was an ambiguity in section 6311 as to the meaning of the word "plaintiff" but that it did not need to resolve this ambiguity because both the personal representative of the estate and the decedent were over 60 years of age at the time of the judgment (Appendix 269A).

Defendant submits that the ambiguity in this statute does need to be resolved in this case. "Plaintiff" is not defined in the statute. Mrs. Shinholster was deceased at the time of the judgment. A wrongful death action, pursuant to MCL 600.2922 provides that the "[e]very action under this section shall be brought by, and in the name of, the personal representative of the estate of the deceased person." The estate of course is not "60" years of age.[10] The persons who can seek recover under the estate and awarded by the jury include the deceased's spouse, children, descendants, parents, grandparents, brothers and sisters. See MCL 600.2922(3). Thus, some, all or none of these persons may be over 60 years of age at the time of the judgment.

The purpose behind section 6311 was evidently to allow an elderly plaintiff full use of any recovery immediately. In a death case, this purpose is moot and/or irrelevant since the true plaintiff is deceased. Further, since the persons whose damages may be the subject of the jury's award and/or who may take any award may be younger than 60 years of age, such purpose is not advanced.

If plaintiff's interpretation of the section 6311 is adopted (that the age of the personal representative is the age to be considered), the statutory requirement of reduction to present value could, and likely will be easily usurped. The estate simply needs to have a personal representative over 60 years of age appointed by the probate court. Of course the personal representative need not be a relative of the decedent and need not take under the estate. Further, a personal

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[10] Contrary to the plaintiff's claims in response to the application for leave, if the "plaintiff" is deemed to be the decedent, such does not preclude application of comparative negligence principles. The comparative negligence statute, MCL 600.2959 does not limit damages to a "plaintiff" but rather provides that the reduction must be by "the percentage of comparative fault of the person upon whose injury or death the damages are based."

representative is not personally liable for any costs that may be incurred by the estate.

Pursuant to MCL 600.6306(2), present cash value is calculated by using a 5% annual discount rate. The jury here awarded five years of future economic damages, at $9,700.00 per year, for a total of $48,500.00. It also awarded five years of future non-economic damages at $62,500 per year, for a total of $312,500.00 (Appendix p 244A). The trial court should have reduced these future damages to present cash value. Future economic damages should have been reduced by $6,504.08 to $41,995.92 and future non-economic damages by $41,907.71 to $270,592.29.

RELIEF REQUESTED

WHEREFORE, Annapolis Hospital, an assumed name for Oakwood United Hospitals, Inc., respectfully requests that this Honorable Court reverse the Court of Appeals' opinion and the trial court's orders and hold that a new trial is required because the trial court improperly limited evidence as to the decedent's comparative negligence and improperly precluded the jury's consideration of such negligence, that any non-economic damages awarded in this case must be reduced to the lower tier cap of MCL 600.1483 and that any future damages awarded in this case must be reduced to their present value pursuant to MCL 600.6306. Defendant further requests costs and attorney fees.

Respectfully submitted,

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Dated: January 16, 2004
I:\LMG\APPEALS\SHINHOLSTER\Pleading\SCt Brf 12-15-03.wpd

ADDENDUM A

MI ST 600.1483
M.C.L.A. 600.1483

MICHIGAN COMPILED LAWS ANNOTATED
CHAPTER 600. **REVISED JUDICATURE ACT OF 1961**
REVISED JUDICATURE ACT OF 1961
CHAPTER 14. GENERAL PROVISIONS

→600.1483. Medical malpractice action; noneconomic loss damages

Sec. 1483. (1) In an action for damages alleging medical malpractice by or against a person or party, the total amount of damages for noneconomic loss recoverable by all plaintiffs, resulting from the negligence of all defendants, shall not exceed $280,000.00 unless, as the result of the negligence of 1 or more of the defendants, 1 or more of the following exceptions apply as determined by the court pursuant to section 6304, [FN1] in which case damages for noneconomic loss shall not exceed $500,000.00:

(a) The plaintiff is hemiplegic, paraplegic, or quadriplegic resulting in a total permanent functional loss of 1 or more limbs caused by 1 or more of the following:

(*i*) Injury to the brain.

(*ii*) Injury to the spinal cord.

(b) The plaintiff has permanently impaired cognitive capacity rendering him or her incapable of making independent, responsible life decisions and permanently incapable of independently performing the activities of normal, daily living.

(c) There has been permanent loss of or damage to a reproductive organ resulting in the inability to procreate.

(2) In awarding damages in an action alleging medical malpractice, the trier of fact shall itemize damages into damages for economic loss and damages for noneconomic loss.

(3) As used in this section, "noneconomic loss" means damages or loss due to pain, suffering, inconvenience, physical impairment, physical disfigurement, or other noneconomic loss.

noneconomic loss

(4) The state treasurer shall adjust the limitation on damages for noneconomic loss set forth in subsection (1) by an

amount determined by the state treasurer at the end of each calendar year to reflect the cumulative annual percentage change in the consumer price index. As used in this subsection, "consumer price index" means the most comprehensive index of consumer prices available for this state from the bureau of labor statistics of the United States department of labor.

consumer price index

CREDIT(S)

P.A.1961, No. 236, § 1483, added by P.A.1986, No. 178, § 1, Eff. Oct. 1, 1986. Amended by P.A.1993, No. 78, § 1, Eff. April 1, 1994.

[FN1] M.C.L.A. § 600.6304.

M. C. L. A. 600.1483, MI ST 600.1483

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C
MICHIGAN COMPILED LAWS ANNOTATED
CHAPTER 600. **REVISED JUDICATURE ACT OF 1961**
REVISED JUDICATURE ACT OF 1961
CHAPTER 29. PROVISIONS CONCERNING SPECIFIC ACTIONS
→600.2922. Wrongful death

Sec. 2922. (1) Whenever the death of a person or injuries resulting in death shall be caused by wrongful act, neglect, or fault of another, and the act, neglect, or fault is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages, the person who or the corporation that would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death was caused under circumstances that constitute a felony.

(2) Every action under this section shall be brought by, and in the name of, the personal representative of the estate of the deceased person. Within 30 days after the commencement of an action, the personal representative shall serve a copy of the complaint and notice as prescribed in subsection (4) upon the person or persons who may be entitled to damages under subsection (3) in the manner and method provided in the rules applicable to probate court proceedings.

(3) Subject to sections 2802 to 2805 of the estates and protected individuals code, 1998 PA 386, MCL 700.2802 to 700.2805, the person or persons who may be entitled to damages under this section shall be limited to any of the following who suffer damages and survive the deceased:

(a) The deceased's spouse, children, descendants, parents, grandparents, brothers and sisters, and, if none of these persons survive the deceased, then those persons to whom the estate of the deceased would pass under the laws of intestate succession determined as of the date of death of the deceased.

(b) The children of the deceased's spouse.

(c) Those persons who are devisees under the will of the deceased, except those whose relationship with the decedent violated Michigan law, including beneficiaries of a trust under the will, those persons who are designated in the will as persons who may be entitled to damages under this section, and the beneficiaries of a living trust of the deceased if there is a devise to that trust in the will of the deceased.

(4) The notice required in subsection (2) shall contain the following:

(a) The name and address of the personal representative and the personal representative's attorney.

(b) A statement that the attorney for the personal representative shall be advised within 60 days after the mailing of the notice of any material fact that may constitute evidence of any claim for damages and that failure to do so may adversely affect his or her recovery of damages and could bar his or her right to any claim at a hearing to distribute proceeds.

(c) A statement that he or she will be notified of a hearing to determine the distribution of the proceeds after the adjudication or settlement of the claim for damages.

(d) A statement that to recover damages under this section the person who may be entitled to damages must present a claim for damages to the personal representative on or before the date set for hearing on the motion for distribution of the proceeds under subsection (6) and that failure to present a claim for damages within the time provided shall bar the person from making a claim to any of the proceeds.

(5) If, for the purpose of settling a claim for damages for wrongful death where an action for those damages is pending, a motion is filed in the court where the action is pending by the personal representative asking leave of the court to settle the claim, the court shall, with or without notice, conduct a hearing and approve or reject the proposed settlement.

(6) In every action under this section, the court or jury may award damages as the court or jury shall consider fair and equitable, under all the circumstances including reasonable medical, hospital, funeral, and burial expenses for which the estate is liable; reasonable compensation for the pain and suffering, while conscious, undergone by the deceased person during the period intervening between the time of the injury and death; and damages for the loss of financial support and the loss of the society and companionship of the deceased. The proceeds of a settlement or judgment in an action for damages for wrongful death shall be distributed as follows:

(a) The personal representative shall file with the court a motion for authority to distribute the proceeds. Upon the filing of the motion, the court shall order a hearing.

(b) Unless waived, notice of the hearing shall be served upon all persons who may be entitled to damages under subsection (3) in the time, manner, and method provided in the rules applicable to probate court proceedings.

(c) If any interested person is a minor, a disappeared person, or an incapacitated individual for whom a fiduciary is not appointed, a fiduciary or guardian ad litem shall be first appointed, and the notice provided in subdivision (b) shall be given to the fiduciary or guardian ad litem of the minor, disappeared person, or legally incapacitated individual.

(d) After a hearing by the court, the court shall order payment from the proceeds of the reasonable medical,

hospital, funeral, and burial expenses of the decedent for which the estate is liable. The proceeds shall not be applied to the payment of any other charges against the estate of the decedent. The court shall then enter an order distributing the proceeds to those persons designated in subsection (3) who suffered damages and to the estate of the deceased for compensation for conscious pain and suffering, if any, in the amount as the court or jury considers fair and equitable considering the relative damages sustained by each of the persons and the estate of the deceased. If there is a special verdict by a jury in the wrongful death action, damages shall be distributed as provided in the special verdict.

(e) If none of the persons entitled to the proceeds is a minor, a disappeared person, or a legally incapacitated individual and all of the persons entitled to the proceeds execute a verified stipulation or agreement in writing in which the portion of the proceeds to be distributed to each of the persons is specified, the order of the court shall be entered in accordance with the stipulation or agreement.

(7) A person who may be entitled to damages under this section must present a claim for damages to the personal representative on or before the date set for hearing on the motion for distribution of the proceeds under subsection (6). The failure to present a claim for damages within the time provided shall bar the person from making a claim to any of the proceeds.

(8) A person who may be entitled to damages under this section shall advise the attorney for the personal representative within 60 days after service of the complaint and notice as provided for under subsection (2) of any material fact of which the person has knowledge and that may constitute evidence of any claim for damages. The person's right to claim at a hearing any proceeds may be barred by the court if the person fails to advise the personal representative as prescribed in this subsection.

(9) If a claim under this section is to be settled and a civil action for wrongful death is not pending under this section, the procedures prescribed in section 3924 of the estates and protected individuals code, 1998 PA 386, MCL 700.3924, shall be applicable to the distribution of the proceeds.

M. C. L. A. 600.2922, MI ST 600.2922

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C
MICHIGAN COMPILED LAWS ANNOTATED
CHAPTER 600. **REVISED JUDICATURE ACT OF 1961**
REVISED JUDICATURE ACT OF 1961
CHAPTER 29. PROVISIONS CONCERNING SPECIFIC ACTIONS

→600.2957. Tort actions; allocation of liability by trier of fact; percentage of fault, considerations; amended pleadings against nonparties, limitation period; defenses or immunities

Sec. 2957. (1) In an action based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death, the liability of each person shall be allocated under this section by the trier of fact and, subject to section 6304, [FN1] in direct proportion to the person's percentage of fault. In assessing percentages of fault under this subsection, the trier of fact shall consider the fault of each person, regardless of whether the person is, or could have been, named as a party to the action.

(2) Upon motion of a party within 91 days after identification of a nonparty, the court shall grant leave to the moving party to file and serve an amended pleading alleging 1 or more causes of action against that nonparty. A cause of action added under this subsection is not barred by a period of limitation unless the cause of action would have been barred by a period of limitation at the time of the filing of the original action.

(3) Sections 2956 to 2960 [FN2] do not eliminate or diminish a defense or immunity that currently exists, except as expressly provided in those sections. Assessments of percentages of fault for nonparties are used only to accurately determine the fault of named parties. If fault is assessed against a nonparty, a finding of fault does not subject the nonparty to liability in that action and shall not be introduced as evidence of liability in another action.

CREDIT(S)

P.A.1961, No. 236, § 2957, added by P.A.1995, No. 161, § 1, Eff. March 28, 1996. Amended by P.A.1995, No. 249, § 1, Eff. March 28, 1996.

[FN1] M.C.L.A. § 600.6304.

[FN2] M.C.L.A. §§ 600.2956 to 600.2960.

M. C. L. A. 600.2957, MI ST 600.2957

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MICHIGAN COMPILED LAWS ANNOTATED
CHAPTER 600. **REVISED JUDICATURE ACT OF 1961**
REVISED JUDICATURE ACT OF 1961
CHAPTER 29. PROVISIONS CONCERNING SPECIFIC ACTIONS

→600.2959. Tort actions; comparative fault of injured or dead person; reduction of economic damages, disallowance of non-economic damages

Sec. 2959. In an action based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death, the court shall reduce the damages by the percentage of comparative fault of the person upon whose injury or death the damages are based as provided in section 6306. [FN1] If that person's percentage of fault is greater than the aggregate fault of the other person or persons, whether or not parties to the action, the court shall reduce economic damages by the percentage of comparative fault of the person upon whose injury or death the damages are based as provided in section 6306, and noneconomic damages shall not be awarded.

CREDIT(S)

P.A.1961, No. 236, § 2959, added by P.A.1995, No. 161, § 1, Eff. March 28, 1996.

[FN1] M.C.L.A. § 600.6306.

M. C. L. A. 600.2959, MI ST 600.2959

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C
MICHIGAN COMPILED LAWS ANNOTATED
CHAPTER 600. **REVISED JUDICATURE ACT OF 1961**
REVISED JUDICATURE ACT OF 1961
CHAPTER 60. ENFORCEMENT OF JUDGMENTS

→600.6098. Medical malpractice and personal injury actions; review of verdict; new trial

Sec. 6098. (1) A judge presiding over an action alleging medical malpractice shall review each verdict to determine if the limitation on noneconomic damages provided for in section 1483 [FN1] applies. If the limitation applies, the court shall set aside any amount of noneconomic damages in excess of the amount specified in section 1483.

(2) A judge presiding over a personal injury action shall review each verdict returned by the jury and shall do 1 of the following:

(a) Concur with the award.

(b) Upon motion by any party, within 21 days of entry of the judgment of the court, grant a new trial to all or some of the parties, on all or some issues, whenever their substantial rights are materially affected, for any of the following reasons:

(i) Irregularity in the proceedings of the court, jury, or prevailing party.

(ii) An order of the court or abuse of discretion which denied the moving party a fair trial.

(iii) Misconduct of the jury or the prevailing party.

(iv) Excessive or inadequate damages appearing to have been influenced by passion or prejudice.

(v) A verdict clearly or grossly inadequate or excessive.

(vi) A verdict or decision against the great weight of the evidence or contrary to law.

(vii) Material evidence, newly discovered, which could not with reasonable diligence have been discovered and produced at trial.

(viii) Error of law occurring in the proceedings or mistake of fact by the court.

(ix) Other grounds as may be provided for by court rule.

(c) Within 21 days after entry of a judgment, the court on its own initiative may order a new trial for any of the reasons set forth in subdivision (b). The order shall specify the grounds on which the order is based.

(d) If the court finds that the only error in the trial is the inadequacy or excessiveness of the verdict, the court may grant a new trial unless, within 14 days, the nonmoving party consents in writing to the entry of judgment in an amount found by the court to be the lowest or highest amount the evidence will support.

(3) If the moving party appeals, the written consent entered under subsection (2)(d) in no way prejudices the nonmoving party's argument on appeal that the original verdict was correct. If the nonmoving party prevails on appeal, the original verdict may be reinstated by the appellate court.

(4) All orders and judgments of the circuit court granting additur or remittitur shall be affirmed on appeal unless the trial judge committed an abuse of discretion.

CREDIT(S)

P.A.1961, No. 236, § 6098, added by P.A.1986, No. 178, § 1, Eff. Oct. 1, 1986.

[FN1] M.C.L.A. § 600.1483.

M. C. L. A. 600.6098, MI ST 600.6098

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MICHIGAN COMPILED LAWS ANNOTATED
CHAPTER 600. **REVISED JUDICATURE ACT OF 1961**
REVISED JUDICATURE ACT OF 1961
CHAPTER 63. PERSONAL INJURY VERDICTS AND DAMAGES

→600.6304. Multiple defendants; special interrogatories or findings; damages, percentage of fault, considerations; award; several liability; medical malpractice claims; governmental agencies; "fault" defined

fault

Sec. 6304. (1) In an action based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death involving fault of more than 1 person, including third-party defendants and nonparties, the court, unless otherwise agreed by all parties to the action, shall instruct the jury to answer special interrogatories or, if there is no jury, shall make findings indicating both of the following:

(a) The total amount of each plaintiff's damages.

(b) The percentage of the total fault of all persons that contributed to the death or injury, including each plaintiff and each person released from liability under section 2925d, [FN1] regardless of whether the person was or could have been named as a party to the action.

(2) In determining the percentages of fault under subsection (1)(b), the trier of fact shall consider both the nature of the conduct of each person at fault and the extent of the causal relation between the conduct and the damages claimed.

(3) The court shall determine the award of damages to each plaintiff in accordance with the findings under subsection (1), subject to any reduction under subsection (5) or section 2955a or 6303, [FN2] and shall enter judgment against each party, including a third-party defendant, except that judgment shall not be entered against a person who has been released from liability as provided in section 2925d.

(4) Liability in an action to which this section applies is several only and not joint. Except as otherwise provided in subsection (6), a person shall not be required to pay damages in an amount greater than his or her percentage of fault as found under subsection (1). This subsection and section 2956 [FN3] do not apply to a defendant that is jointly and severally liable under section 6312. [FN4]

(5) In an action alleging medical malpractice, the court shall reduce an award of damages in excess of 1 of the limitations set forth in section 1483 [FN5] to the amount of the appropriate limitation set forth in section 1483. The jury shall not be advised by the court or by counsel for either party of the limitations set forth in section 1483

or any other provision of section 1483.

(6) If an action includes a medical malpractice claim against a person or entity described in section 5838a(1), 1 of the following applies:

(a) If the plaintiff is determined to be without fault under subsections (1) and (2), the liability of each defendant is joint and several, whether or not the defendant is a person or entity described in section 5838a(1) .

(b) If the plaintiff is determined to have fault under subsections (1) and (2), upon motion made not later than 6 months after a final judgment is entered, the court shall determine whether all or part of a party's share of the obligation is uncollectible from that party, and shall reallocate any uncollectible amount among the other parties, whether or not another party is a person or entity described in section 5838a(1), [FN6] according to their respective percentages of fault as determined under subsection (1). A party is not required to pay a percentage of any uncollectible amount that exceeds that party's percentage of fault as determined under subsection (1). The party whose liability is reallocated continues to be subject to contribution and to any continuing liability to the plaintiff on the judgment.

(7) Notwithstanding subsection (6), a governmental agency, other than a governmental hospital or medical care facility, is not required to pay a percentage of any uncollectible amount that exceeds the governmental agency's percentage of fault as determined under subsection (1).

(8) As used in this section, "fault" includes an act, an omission, conduct, including intentional conduct, a breach of warranty, or a breach of a legal duty, or any conduct that could give rise to the imposition of strict liability, that is a proximate cause of damage sustained by a party.

CREDIT(S)

P.A.1961, No. 236, § 6304, added by P.A.1986, No. 178, § 1, Eff. Oct. 1, 1986. Amended by P.A.1993, No. 78, § 1, Eff. April 1, 1994; P.A.1995, No. 161, § 1, Eff. March 28, 1996; P.A.1995, No. 249, § 1, Eff. March 28, 1996.

[FN1] M.C.L.A. § 600.2925d.

[FN2] M.C.L.A. § 600.2955a or 600.6303.

[FN3] M.C.L.A. § 600.2956.

[FN4] M.C.L.A. § 600.6312.

[FN5] M.C.L.A. § 600.1483.

[FN6] M.C.L.A. § 600.5838a(1).

M. C. L. A. 600.6304, MI ST 600.6304

Current through P.A.2003, No. 233

END OF DOCUMENT

C
MICHIGAN COMPILED LAWS ANNOTATED
CHAPTER 600. **REVISED JUDICATURE ACT OF 1961**
REVISED JUDICATURE ACT OF 1961
CHAPTER 63. PERSONAL INJURY VERDICTS AND DAMAGES
→600.6306. Order of judgment; determination

Sec. 6306. (1) After a verdict rendered by a trier of fact in favor of a plaintiff, an order of judgment shall be entered by the court. Subject to section 2959, [FN1] the order of judgment shall be entered against each defendant, including a third-party defendant, in the following order and in the following judgment amounts:

(a) All past economic damages, less collateral source payments as provided for in section 6303. [FN2]

(b) All past noneconomic damages.

(c) All future economic damages, less medical and other health care costs, and less collateral source payments determined to be collectible under section 6303(5) [FN3] reduced to gross present cash value.

(d) All future medical and other health care costs reduced to gross present cash value.

(e) All future noneconomic damages reduced to gross present cash value.

(f) All taxable and allowable costs, including interest as permitted by section 6013 or 6455 [FN4] on the judgment amounts.

(2) As used in this section, "gross present cash value" means the total amount of future damages reduced to present value at a rate of 5% per year for each year in which those damages accrue, as found by the trier of fact as provided in section 6305(1)(b). [FN5]

gross present cash value

(3) If the plaintiff was assigned a percentage of fault under section 6304, [FN6] the total judgment amount shall be

reduced, subject to section 2959, by an amount equal to the percentage of plaintiff's fault. When reducing the judgment amount as provided in this subsection, the court shall determine the ratio of total past damages to total future damages and shall allocate the amounts to be deducted proportionally between the past and future damages.

CREDIT(S)

P.A.1961, No. 236, § 6306, added by P.A.1986, No. 178, § 1, Eff. Oct. 1, 1986. Amended by P.A.1995, No. 161, § 1, Eff. March 28, 1996.

[FN1] M.C.L.A. § 600.2959.

[FN2] M.C.L.A. § 600.6303.

[FN3] M.C.L.A. § 600.6303(5).

[FN4] M.C.L.A. § 600.6013 or 600.6455.

[FN5] M.C.L.A. § 600.6305(1)(b).

[FN6] M.C.L.A. § 600.6304.

M. C. L. A. 600.6306, MI ST 600.6306

Current through P.A.2003, No. 233

END OF DOCUMENT

MI ST 600.6311
M.C.L.A. 600.6311

C
MICHIGAN COMPILED LAWS ANNOTATED
CHAPTER 600. **REVISED JUDICATURE ACT OF 1961**
REVISED JUDICATURE ACT OF 1961
CHAPTER 63. PERSONAL INJURY VERDICTS AND DAMAGES
→600.6311. Plaintiffs over age of 60 years; inapplicability of certain provisions

Sec. 6311. Sections 6306(1)(c), (d), and (e), 6307, and 6309 [FN1] do not apply to a plaintiff who is 60 years of age or older at the time of judgment.

CREDIT(S)

P.A.1961, No. 236, § 6311, added by P.A.1986, No. 178, § 1, Eff. Oct. 1, 1986.

[FN1] M.C.L.A. §§ 600.6306(1)(c), (d), and (e), 600.6307 and 600.6309.

M. C. L. A. 600.6311, MI ST 600.6311

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END OF DOCUMENT

ADDENDUM B

600.1483 Action for damages alleging medical malpractice; limitation on noneconomic damages; itemizing damages into economic and noneconomic damages; "noneconomic loss" defined; increasing limitation on noneconomic loss. [M.S.A. 27A.1483]

Sec. 1483. (1) In an action for damages alleging medical malpractice against a person or party specified in section 5838a, damages for noneconomic loss which exceeds $225,000.00 shall not be awarded unless 1 or more of the following circumstances exist:

(a) There has been a death.

(b) There has been an intentional tort.

(c) A foreign object was wrongfully left in the body of the patient.

(d) The injury involves the reproductive system of the patient.

(e) The discovery of the existence of the claim was prevented by the fraudulent conduct of a health care provider.

(f) A limb or organ of the patient was wrongfully removed.

(g) The patient has lost a vital bodily function.

(2) In awarding damages in an action alleging medical malpractice, the trier of fact shall itemize damages into economic and noneconomic damages.

(3) "Noneconomic loss" means damages or loss due to pain, suffering, inconvenience, physical impairment, physical disfigurement, or other noneconomic loss.

(4) The limitation on noneconomic damages set forth in subsection (1) shall be increased by an amount determined by the state treasurer at the end of each calendar year to reflect the cumulative annual percentage increase in the consumer price index. As used in this subsection, "consumer price index" means the most comprehensive index of consumer prices available for this state from the bureau of labor statistics of the United States department of labor.

ADDENDUM C

The question being on the adoption of the amendments,
The amendments were not adopted, a majority of the Senators serving not having voted therefor.
Senator Kelly requested the yeas and nays.
The yeas and nays were ordered, 1/5 of the Senators present having voted therefor.
The Senators voted as follows:

Roll Call No. 40

Yeas—15

Berryman	Faust	Koivisto	Smith
Cherry	Hart	Miller	Stabenow
Dillingham	Honigman	O'Brien	Vaughn
Dingell	Kelly	Pollack	

Nays—19

Arthurhultz	DeGrow	Gast	Schwarz
Bouchard	DiNello	Geake	Van Regenmorter
Carl	Dunaskiss	McManus	Wartner
Cisky	Ehlers	Posthumus	Welborn
Conroy	Emmons	Pridnia	

Excused—2

Faxon	Holmes

Not Voting—0

The amendments were not adopted, a majority of the Senators serving not having voted therefor.
Senators Stabenow and Dillingham offered the following amendment:
1. Amend page 4, line 10, after "Sec. 1483." by striking out all of subsection (1) and inserting:
"(1) In an action for damages alleging medical malpractice against a person or party specified in section 5838a, damages for noneconomic loss ~~which exceeds~~ THAT EXCEED ~~$225,000.00~~ $350,000.00 shall not be awarded unless 1 or more of the following circumstances exist:
(a) There has been a death OR DIMINISHED PROGNOSIS SUCH THAT DEATH IS LIKELY TO OCCUR BEFORE NORMAL LIFE EXPECTANCY.
(b) PERMANENT DISABILITY LIMITED TO THAT RESULTING FROM INJURY CAUSING BLINDNESS, DEAFNESS, LOSS OF LIMB, INJURY TO THE BRAIN, SPINAL CORD, OR CARDIOVASCULAR SYSTEM.
(c) PERMANENT LOSS OR DAMAGE TO A REPRODUCTIVE ORGAN.
(2) IN THOSE CASES WHERE 1 OF THE ABOVE CIRCUMSTANCES EXIST, DAMAGES FOR NONECONOMIC LOSS THAT EXCEED $1,000,000.00 SHALL NOT BE AWARDED." and renumbering the remaining subsections.
The question being on the adoption of the amendment,
Senator Stabenow requested the yeas and nays.
The yeas and nays were ordered, 1/5 of the Senators present having voted therefor.
The Senators voted as follows:

Roll Call No. 41

Yeas—15

Berryman	Dingell	Kelly	Smith
Carl	Faust	Miller	Stabenow
Cherry	Hart	O'Brien	Vaughn
Dillingham	Honigman	Pollack	

Nays—19

Arthurhultz	DiNello	Geake	Schwarz
Bouchard	Dunaskiss	Koivisto	Van Regenmorter
Cisky	Ehlers	McManus	Wartner
Conroy	Emmons	Posthumus	Welborn
DeGrow	Gast	Pridnia	

Excused—2

Faxon	Holmes

Not Voting—0

The amendment was not adopted, a majority of the Senators serving not having voted therefor.
Senators Smith and Carl offered the following amendments:
1. Amend page 1, line 1, by striking out all of enacting section 1 and inserting:
"Section 1. Sections 1483, 2169, 2912a, 2912d, 2912e, 5838a, 5851, 5856, and 6013 of Act No. 236 of the Public Acts of 1961, sections 1483, 2169, 2912d, 2912e, and 5838a as added and section 5851 as amended by Act No.178 of the Public Acts of 1986 and section 6013 as amended by Act No. 50 of the Public Acts of 1987, being sections 600.1483, 600.2169, 600.2912a, 600.2912d, 600.2912e, 600.5838a, 600.5851, 600.5856, and 600.6013 of the Michigan Compiled Laws, are amended and sections 2912b, 2912f, and 2912g are added to read as follows:".
2. Amend page 2, line 7, by striking out all of section 955.
The amendments were not adopted, a majority of the Senators serving not having voted therefor.
Senator Smith requested the yeas and nays.
The yeas and nays were ordered, 1/5 of the Senators present having voted therefor.
The Senators voted as follows:

Roll Call No. 42

Yeas—17

Arthurhultz	Dingell	Kelly	Smith
Berryman	Faust	Miller	Stabenow
Carl	Hart	O'Brien	Vaughn
Cherry	Honigman	Pollack	Welborn
Dillingham			

Nays—17

Bouchard	Dunaskiss	Geake	Pridnia
Cisky	Ehlers	Koivisto	Schwarz
Conroy	Emmons	McManus	Van Regenmorter
DeGrow	Gast	Posthumus	Wartner
DiNello			

Excused—2

Faxon	Holmes

Not Voting—0

(The bill was read a second time, substitute (H-1) adopted, substitute (H-2) adopted and postponed temporarily on April 21, see p. 897 of House Journal No. 32; Nye amendments adopted, reconsidered and amendments postponed temporarily, Nye amendment offered and postponed temporarily, Profit amendments offered and postponed temporarily, Cropsey amendment not adopted, motion made to reconsider and postponed temporarily and bill postponed temporarily on April 22, see p. 922 of House Journal No. 33.)

Rep. Yokich moved to amend the bill as follows:

1. Amend page 26, line 25, after "HER" by striking out "EIGHTH" and inserting "THIRTEENTH".
2. Amend page 27, line 1, by striking out "TENTH" and reinserting "THIRTEENTH".
3. Amend page 27, line 5, after "HER" and inserting "FIFTEENTH".

The question being on the adoption of the amendments offered by Rep. Yokich,

Rep. Bandstra demanded the yeas and nays.

The demand was supported.

The question being on the adoption of the amendments offered by Rep. Yokich,

After debate,

Rep. Hertel demanded the previous question.

The demand was supported.

The question being, "Shall the main question now be put?"

The previous question was ordered.

The question being on the adoption of the amendments offered by Rep. Yokich,

The amendments were not adopted, a majority of the members serving not voting therefor, by yeas and nays, as follows:

Roll Call No. 232 **Yeas—48**

Agee	Emerson	Leland	Saunders
Allen	Freeman	Mathieu	Schroer
Anthony	Gagliardi	Murphy	Scott
Baade	Gire	Nye	Varga
Barns	Gubow	Olshove	Vorva
Berman	Gustafson	O'Neill	Wallace
Brown	Harder	Owen	Weeks
Ciaramitaro	Harrison	Palamara	Whyman
Clack	Hertel	Pitoniak	Willard
Cropsey	Hollister	Points	Yokich
Curtis	Hood	Profit	Young, J., Jr.
DeMars	Jondahl	Rivers	Young, R.

Nays—56

Alley	Dolan	Jaye	Middleton
Bandstra	Fitzgerald	Jersevic	Munsell
Bankes	Galloway	Johnson	Oxender
Bender	Gernaat	Kaza	Porreca
Bobier	Gilmer	Keith	Randall
Bodem	Gnodtke	Kukuk	Rhead
Brackenridge	Goschka	Llewellyn	Rocca
Bryant	Griffin	London	Shepich
Bullard	Hammerstrom	Lowe	Shugars
Byrum	Hill	Martin	Sikkema
Crissman	Hillegonds	McBryde	Stille
Dalman	Horton	McManus	Voorhees
DeLange	Jacobetti	McNutt	Walberg
Dobb	Jamian	Middaugh	Wetters

In The Chair: Murphy

Rep. Bennane moved to amend the bill as follows:

1. Amend page 35, following line 26, by inserting:

"(i) House Bill No. 4403.

(j) House Bill No. 4404.

(k) House Bill No. 4405.

(l) House Bill No. 4406.".

The question being on the adoption of the amendment offered by Rep. Bennane,

Rep. Hertel moved that consideration of the amendment be postponed temporarily.

The motion prevailed.

Rep. Curtis moved to amend the bill as follows:

1. Amend page 3, following line 11, by inserting:

"(D) THERE HAS BEEN A DEATH.".

The question being on the adoption of the amendment offered by Rep. Curtis,

Rep. Bandstra moved that consideration of the amendment be postponed temporarily.

The motion prevailed.

Rep. Gubow moved to amend the bill as follows:

1. Amend page 2, line 7, after "(1)" by striking out "In" and inserting "EXCEPT AS OTHERWISE PROVIDED IN SUBSECTION (2), IN".

2. Amend page 3, following line 11, by inserting:

"(2) IN AN ACTION FOR DAMAGES ALLEGING MEDICAL MALPRACTICE, IF THERE HAS BEEN GROSS NEGLIGENCE OR AN INTENTIONAL TORT, SUBSECTION (1) DOES NOT APPLY. AS USED IN THIS SUBSECTION, "GROSS NEGLIGENCE" MEANS CONDUCT SO RECKLESS AS TO DEMONSTRATE A SUBSTANTIAL LACK OF CONCERN FOR WHETHER AN INJURY RESULTS." and renumbering the remaining subsections.

The question being on the adoption of the amendments offered by Rep. Gubow,

Rep. Bandstra demanded the yeas and nays.

The demand was supported.

The question being on the adoption of the amendments offered by Rep. Gubow,

The amendments were not adopted, a majority of the members serving not voting therefor, by yeas and nays, as follows:

Roll Call No. 233 **Yeas—36**

Agee	DeMars	Jondahl	Rivers
Allen	Emerson	Leland	Saunders
Anthony	Freeman	Mathieu	Schroer
Baade	Gire	Murphy	Scott
Barns	Gubow	Olshove	Varga
Berman	Harrison	O'Neill	Wallace
Brown	Hertel	Pitoniak	Willard
Byrum	Hollister	Points	Yokich
Clack	Hood	Profit	Young, J., Jr.

Nays—67

Alley	Gagliardi	Johnson	Palamara
Bandstra	Galloway	Kaza	Porreca
Bankes	Gernaat	Keith	Randall
Bender	Gilmer	Kukuk	Rhead
Bobier	Gnodtke	Llewellyn	Rocca
Bodem	Goschka	London	Shepich
Brackenridge	Griffin	Lowe	Shugars
Bryant	Gustafson	Martin	Sikkema
Bullard	Hammerstrom	McBryde	Stille
Crissman	Harder	McManus	Voorhees

Reps. Profit, Byrum, Porreca, Gire, Baade, Bullard, Voorhees, DeMars, Yokich, Palamara and Berman introduced
House Bill No. 4673, entitled

A bill to amend sections 82 and 234d of Act No. 328 of the Public Acts of 1931, entitled as amended "The Michigan penal code," section 234d as amended by Act No. 218 of the Public Acts of 1992, being sections 750.82 and 750.234d of the Michigan Compiled Laws; and to add sections 235a, 237a, and 237b.

The bill was read a first time by its title and referred to the Committee on Judiciary.

Reps. Profit, Byrum, Porreca, Gire, Baade, Bullard, Voorhees, DeMars, Yokich, Palamara and Berman introduced
House Bill No. 4674, entitled

A bill to amend Act No. 59 of the Public Acts of 1935, entitled as amended "An act to provide for the public safety; to create the Michigan state police, and provide for the organization thereof; to transfer thereto the offices, duties and powers of the state fire marshal, the state oil inspector, the department of the Michigan state police as heretofore organized, and the department of public safety; to create the office of commissioner of the Michigan state police; to provide for an acting commissioner and for the appointment of the officers and members of said department; to prescribe their powers, duties, and immunities; to provide the manner of fixing their compensation; to provide for their removal from office; and to repeal Act No. 26 of the Public Acts of 1919, being sections 556 to 562, inclusive, of the Compiled Laws of 1929, and Act No. 123 of the Public Acts of 1921, as amended, being sections 545 to 555, inclusive, of the Compiled Laws of 1929," as amended, being sections 28.1 to 28.15 of the Michigan Compiled Laws, by adding section 16.

The bill was read a first time by its title and referred to the Committee on Judiciary.

Reps. Profit, Byrum, Porreca, Gire, Baade, Bullard, Voorhees, DeMars, Yokich, Palamara and Berman introduced
House Bill No. 4675, entitled

A bill to create the school security task force within the department of education; to prescribe its powers and duties; and to repeal this act on a specific date.

The bill was read a first time by its title and referred to the Committee on Education.

Rep. Griffin introduced
House Bill No. 4676, entitled

A bill to amend section 27 of Act No. 206 of the Public Acts of 1893, entitled as amended "The general property tax act," as amended by Act No. 283 of the Public Acts of 1989, being section 211.27 of the Michigan Compiled Laws.

The bill was read a first time by its title and referred to the Committee on Taxation.

By unanimous consent the House returned to the order of

Second Reading of Bills

Senate Bill No. 270, entitled

A bill to amend sections 1483, 2169, 2912a, 2912d, 2912e, 5838a, 5851, 5856, and 6013 of Act No. 236 of the Public Acts of 1961, entitled as amended "Revised judicature act of 1961," sections 1483, 2169, 2912d, 2912e, and 5838a as added and section 5851 as amended by Act No. 178 of the Public Acts of 1986 and section 6013 as amended by Act No. 50 of the Public Acts of 1987, being sections 600.1483, 600.2169, 600.2912a, 600.2912d, 600.2912e, 600.5838a, 600.5851, 600.5856, and 600.6013 of the Michigan Compiled Laws; and to add sections 955, 2912b, 2912f, and 2912g.

(The bill was read a second time, substitute (H-1) adopted, substitute (H-2) adopted and postponed temporarily on April 21, see p. 897 of House Journal No. 32; Nye amendments adopted, reconsidered and amendments postponed temporarily, Nye amendment offered and postponed temporarily, Profit amendments offered and postponed temporarily, Cropsey amendment not adopted, motion made to reconsider and postponed temporarily and bill postponed temporarily on April 22, see p. 922 of House Journal No. 33; Bennane amendment offered and postponed temporarily, Curtis amendment offered and postponed temporarily, Gubow amendments offered and postponed temporarily, Yokich amendment offered and postponed temporarily, Mathieu amendment offered and postponed temporarily and bill postponed temporarily on April 27, see p. 951 of House Journal No. 34.)

Rep. Wallace moved to amend the bill as follows:

1. Amend page 13, line 17, after "BY" by striking out the balance of the sentence and inserting "THE PLAINTIFF'S ATTORNEY.".

2. Amend page 16, line 4, after "BY" by striking out the balance of the sentence and inserting "THE DEFENDANT'S ATTORNEY.".

The question being on the adoption of the amendments offered by Rep. Wallace,

Rep. Bandstra demanded the yeas and nays.

The demand was supported.

The question being on the adoption of the amendments offered by Rep. Wallace,

The amendments were not adopted, a majority of the members serving not voting therefor, by yeas and nays, as follows:

Roll Call No. 240 **Yeas—40**

Agee	Cropsey	Jersevic	Profit
Anthony	Curtis	Jondahl	Rivers
Baade	DeMars	Kilpatrick	Saunders
Barns	Freeman	Mathieu	Schroer
Bennane	Gire	Murphy	Scott
Berman	Gubow	Olshove	Vorva
Brown	Harder	O'Neill	Wallace
Byrum	Harrison	Palamara	Wetters
Ciaramitaro	Hollister	Pitoniak	Willard
Clack	Hood	Points	Yokich

Nays—60

Allen	Gagliardi	Jaye	Munsell
Alley	Galloway	Johnson	Nye
Bandstra	Gernaat	Kaza	Owen
Bankes	Gilmer	Keith	Oxender
Bender	Gnodtke	Kukuk	Porreca
Bodem	Goschka	Leland	Randall
Brackenridge	Griffin	Llewellyn	Rhead
Bryant	Gustafson	London	Rocca
Bullard	Hammerstrom	Lowe	Shepich
Cressman	Hertel	Martin	Shugars
Dalman	Hill	McBryde	Sikkema
DeLange	Hillegonds	McManus	Stille
Dobb	Horton	McNutt	Voorhees
Dolan	Jacobetti	Middaugh	Whyman
Fitzgerald	Jamian	Middleton	Young, R.

In The Chair: Hertel

Rep. Emerson entered the House and took his seat.

Rep. Jondahl moved to amend the bill as follows:

1. Amend page 2, line 25, after "APPLY" by striking out "AS DETERMINED BY THE COURT PURSUANT TO SECTION 6304".

2. Amend page 3, line 1, by inserting:

"(A) THERE HAS BEEN A DEATH." and renumbering the remaining subdivisions.

3. Amend page 3, following line 11, by inserting:

"(D) THERE HAS BEEN AN ALTERATION, DESTRUCTION, OR FALSIFICATION OF A MEDICAL RECORD OR CHART IN VIOLATION OF SECTION 492A OF THE MICHIGAN PENAL CODE, ACT NO. 368 OF THE PUBLIC ACTS OF 1931, BEING SECTION 750.492A OF THE MICHIGAN COMPILED LAWS.".

The question being on the adoption of the amendments offered by Rep. Jondahl,
Rep. Yokich demanded the yeas and nays.
The demand was supported.
The question being on the adoption of the amendments offered by Rep. Jondahl,
After debate,
Rep. Randall demanded the previous question.
The demand was supported.
The question being, "Shall the main question now be put?"
The previous question was ordered.
The question being on the adoption of the amendments offered by Rep. Jondahl,
The amendments were not adopted, a majority of the members serving not voting therefor, by yeas and nays, as follows:

Roll Call No. 241 **Yeas—41**

Agee	DeMars	Jondahl	Rivers
Anthony	Freeman	Kilpatrick	Saunders
Baade	Gire	Leland	Schroer
Barns	Gubow	Mathieu	Scott
Bennane	Harder	McBryde	Varga
Berman	Harrison	Murphy	Vorva
Brown	Hertel	Olshove	Wallace
Byrum	Hollister	O'Neill	Wetters
Ciaramitaro	Hood	Pitoniak	Willard
Clack	Jersevic	Points	Yokich
Curtis			

Nays—58

Allen	Galloway	Kaza	Oxender
Alley	Gernaat	Keith	Porreca
Bandstra	Gilmer	Kukuk	Profit
Bankes	Gnodtke	Llewellyn	Randall
Bender	Goschka	London	Rhead
Bobier	Griffin	Lowe	Rocca
Bodem	Gustafson	Martin	Shepich
Brackenridge	Hammerstrom	McManus	Shugars
Bullard	Hill	McNutt	Sikkema
Crissman	Hillegonds	Middaugh	Stille
Cropsey	Horton	Middleton	Voorhees
Dalman	Jacobetti	Munsell	Walberg
Dobb	Jamian	Nye	Whyman
Dolan	Jaye	Owen	Young, R.
Fitzgerald	Johnson		

In The Chair: Hertel

Rep. Jondahl moved to amend the bill as follows:
1. Amend page 3, line 1, by inserting:
"(A) THERE HAS BEEN A DEATH." and renumbering the remaining subdivisions.
2. Amend page 3, following line 11, by inserting:
"(D) THERE HAS BEEN AN ALTERATION, DESTRUCTION, OR FALSIFICATION OF A MEDICAL RECORD OR CHART IN VIOLATION OF SECTION 492A OF THE MICHIGAN PENAL CODE, ACT NO. 368 OF THE PUBLIC ACTS OF 1931, BEING SECTION 750.492A OF THE MICHIGAN COMPILED LAWS.".

The question being on the adoption of the amendments offered by Rep. Jondahl,
Rep. Jondahl demanded the yeas and nays.
The demand was supported.
The question being on the adoption of the amendments offered by Rep. Jondahl,
After debate,
Rep. Palamara demanded the previous question.
The demand was supported.
The question being, "Shall the main question now be put?"
The previous question was ordered.
The question being on the adoption of the amendments offered by Rep. Jondahl,
The amendments were not adopted, a majority of the members serving not voting therefor, by yeas and nays, as follows:

Roll Call No. 242 **Yeas—45**

Anthony	Emerson	Kilpatrick	Rivers
Baade	Freeman	Leland	Saunders
Barns	Gagliardi	Mathieu	Schroer
Bennane	Gire	McBryde	Scott
Berman	Gubow	Murphy	Varga
Brown	Harder	Nye	Vorva
Byrum	Harrison	Olshove	Wallace
Ciaramitaro	Hertel	O'Neill	Wetters
Clack	Hollister	Palamara	Willard
Cropsey	Hood	Pitoniak	Yokich
Curtis	Jersevic	Points	Young, R.
DeMars			

Nays—54

Allen	Fitzgerald	Jaye	Munsell
Alley	Galloway	Johnson	Oxender
Bandstra	Gernaat	Kaza	Porreca
Bankes	Gilmer	Keith	Randall
Bender	Gnodtke	Kukuk	Rhead
Bobier	Goschka	Llewellyn	Rocca
Bodem	Griffin	London	Shepich
Brackenridge	Gustafson	Lowe	Shugars
Bullard	Hammerstrom	Martin	Sikkema
Crissman	Hill	McManus	Stille
Dalman	Hillegonds	McNutt	Voorhees
DeLange	Horton	Middaugh	Walberg
Dobb	Jacobetti	Middleton	Whyman
Dolan	Jamian		

In The Chair: Hertel

Rep. McNutt moved to amend the bill as follows:
1. Amend page 2, line 23, after "EXCEED" by striking out "$250,000.00" and inserting "$280,000.00".
The question being on the adoption of the amendment offered by Rep. McNutt,
Rep. McNutt demanded the yeas and nays.
The demand was supported.
The question being on the adoption of the amendment offered by Rep. McNutt,
The amendment was adopted, a majority of the members serving voting therefor, by yeas and nays, as follows:

Nays—52

Alley	Galloway	Jaye	Oxender
Bandstra	Gernaat	Johnson	Porreca
Bankes	Gilmer	Kaza	Profit
Bender	Gnodtke	Keith	Randall
Bobier	Goschka	Kukuk	Rhead
Bodem	Griffin	Llewellyn	Rocca
Brackenridge	Gustafson	London	Shepich
Bullard	Hammerstrom	Lowe	Shugars
Crissman	Hill	Martin	Sikkema
Dalman	Hillegonds	McManus	Stille
DeLange	Horton	Middaugh	Voorhees
Dobb	Jacobetti	Middleton	Walberg
Fitzgerald	Jamian	Munsell	Whyman

In The Chair: Hertel

The question being on the adoption of the amendments offered previously by Rep. Gubow (see p. 954 of House Journal No. 34),

Rep. Bandstra demanded the yeas and nays.

The demand was supported.

The question being on the adoption of the amendments offered previously by Rep. Gubow,

The amendments were not adopted, a majority of the members serving not voting therefor, by yeas and nays, as follows:

Roll Call No. 255

Yeas—44

Agee	Curtis	Jondahl	Points
Allen	DeMars	Kilpatrick	Profit
Anthony	Freeman	Leland	Rivers
Baade	Gagliardi	Mathieu	Saunders
Barns	Gire	Murphy	Schroer
Bennane	Gubow	Nye	Scott
Berman	Harder	Olshove	Varga
Brown	Harrison	O'Neill	Wallace
Byrum	Hertel	Owen	Willard
Ciaramitaro	Hollister	Palamara	Yokich
Cropsey	Hood	Pitoniak	Young, R.

Nays—57

Alley	Gernaat	Johnson	Oxender
Bandstra	Gilmer	Kaza	Porreca
Bankes	Gnodtke	Keith	Randall
Bender	Goschka	Kukuk	Rhead
Bobier	Griffin	Llewellyn	Rocca
Bodem	Gustafson	London	Shepich
Brackenridge	Hammerstrom	Lowe	Shugars
Bullard	Hill	Martin	Sikkema
Crissman	Hillegonds	McBryde	Stille
Dalman	Horton	McManus	Voorhees
DeLange	Jacobetti	McNutt	Vorva
Dobb	Jamian	Middaugh	Walberg
Dolan	Jaye	Middleton	Wetters
Fitzgerald	Jersevic	Munsell	Whyman
Galloway			

In The Chair: Hertel

The question being on the adoption of the amendment offered previously by Rep. Gubow (see p. 956 of House Journal No. 34),

Rep. Gubow withdrew the amendment.

The question being on the adoption of the amendment offered previously by Rep. Gubow (see p. 956 of House Journal No. 34),

Rep. Gubow withdrew the amendment.

The question being on the adoption of the amendment offered previously by Rep. Yokich (see p. 959 of House Journal No. 34),

Rep. Yokich withdrew the amendment.

Rep. Wallace moved to amend the bill as follows:

1. Amend page 2, line 7, after "(1)" by inserting "SUBJECT TO SUBSECTION (2),".
2. Amend page 2, line 23, after "EXCEED" by striking out "$250,000.00" and inserting "$500,000.00".
3. Amend page 2, line 25, after "APPLY" by striking out "AS DETERMINED BY THE COURT PURSUANT TO SECTION 6304".
4. Amend page 2, line 27, after "EXCEED" by striking out "$500,000.00" and inserting "$1,000,000.00".
5. Amend page 3, line 1, by inserting:

"(A) THERE HAS BEEN A DEATH." and relettering the remaining subdivisions.

6. Amend page 3, following line 11, by inserting:

"(D) THERE HAS BEEN AN ALTERATION, DESTRUCTION, OR FALSIFICATION OF A MEDICAL RECORD OR CHART IN VIOLATION OF SECTION 492A OF THE MICHIGAN PENAL CODE, ACT NO. 368 OF THE PUBLIC ACTS OF 1931, BEING SECTION 750.492A OF THE MICHIGAN COMPILED LAWS.".

7. Amend page 3, following subsection (D), by inserting:

"(2) IF A DEFENDANT OFFERS TO THE COURT SATISFACTORY EVIDENCE OF COMPLIANCE WITH THE FINANCIAL RESPONSIBILITY REQUIREMENTS OF SECTION 16280 OF THE PUBLIC HEALTH CODE, ACT NO. 368 OF THE PUBLIC ACTS OF 1978, BEING SECTION 333.16280 OF THE MICHIGAN COMPILED LAWS, THE LIMITATION ON DAMAGES FOR NONECONOMIC LOSS SET FORTH IN SUBSECTION (1) ARE REDUCED BY 50%." and renumbering the remaining subsections.

8. Amend page 35, following line 26, by inserting:

"(i) House Bill No. 4404.".

The question being on the adoption of the amendments offered by Rep. Wallace,

Rep. Bandstra demanded the yeas and nays.

The demand was supported.

The question being on the adoption of the amendments offered by Rep. Wallace,

The amendments were not adopted, a majority of the members serving not voting therefor, by yeas and nays, as follows:

Roll Call No. 256

Yeas—35

Agee	Gire	Kilpatrick	Saunders
Anthony	Gubow	Leland	Schroer
Baade	Harder	Mathieu	Scott
Barns	Harrison	Murphy	Varga
Bennane	Hertel	Nye	Wallace
Berman	Hollister	Olshove	Willard
Byrum	Hood	Pitoniak	Yokich
Ciaramitaro	Jondahl	Points	Young, R.
DeMars	Keith	Rivers	

Nays—60

Allen	Fitzgerald	Jersevic	Oxender
Alley	Galloway	Johnson	Palamara
Bandstra	Gernaat	Kaza	Porreca
Bankes	Gilmer	Kukuk	Profit
Bender	Gnodtke	Llewellyn	Randall

ADDENDUM D

No. 61
STATE OF MICHIGAN
Journal of the Senate
87th Legislature
REGULAR SESSION OF 1993

Senate Chamber, Lansing, Tuesday, June 29, 1993.

10:00 a.m.

The Senate was called to order by the President, Lieutenant Governor Connie B. Binsfeld.

The roll of the Senate was called by the Secretary of the Senate.

Arthurhultz—present
Berryman—present
Bouchard—present
Carl—present
Cherry—present
Cisky—present
Conroy—present
DeGrow—present
Dillingham—present
DiNello—present
Dingell—present
Dunaskiss—present
Ehlers—present
Emmons—present
Faust—present
Faxon—present
Gast—present
Geake—present
Gougeon—present
Hart—present
Holmes—present
Hoffman—present
Honigman—present
Kelly—present
Koivisto—present
McManus—present
Miller—present
O'Brien—present
Pollack—present
Posthumus—present
Pridnia—present
Schwarz—present
Smith—present
Stabenow—present
Van Regenmorter—present
Vaughn—present
Wartner—present
Welborn—present

29 Senators answered the roll of the Senate, a quorum.

Protest

Senator DiNello, under his constitutional right of protest (Art. IV, Sec. 18), protested against the passage of House Bill No. 4760.

Senator DiNello's statement is as follows:

According to the analysis that I have in front of me today, House Bill No. 4760 was amended to remove the sunset to allow the check-off to continue without expiration. I totally disagree with that amendment. I am not against the check-off for the Non-game Fish and Wildlife Fund. I think that's a good idea. But to let it go on in perpetuity without a sunset provision is something that I objected to, and I don't think it should have been on this bill. As a matter of fact, I think we in this legislature ought to be considering more sunset provisions on some of these bills that we've passed around here so we can review them after a period of time. And I think this bill is going in the wrong direction by taking off the sunset provision in order to review to see exactly how effective it is. So while I agree with the intent of the bill, I disagree with the fact that we took off the check-off provision without any further expiration, and I thought that's the wrong direction to go.

Senator Kelly entered the Senate Chamber.

By unanimous consent the Senate returned to the order of

Messages from the House

By unanimous consent the Senate returned to consideration of the following bill:

Senate Bill No. 270, entitled

A bill to amend sections 1483, 2169, 2912a, 2912d, 2912e, 5838a, 5851, 5856, and 6013 of Act No. 236 of the Public Acts of 1961, entitled as amended "Revised judicature act of 1961," sections 1483, 2169, 2912d, 2912e, and 5838a as added and section 5851 as amended by Act No. 178 of the Public Acts of 1986 and section 6013 as amended by Act No. 50 of the Public Acts of 1987, being sections 600.1483, 600.2169, 600.2912a, 600.2912d, 600.2912e, 600.5838a, 600.5851, 600.5856, and 600.6013 of the Michigan Compiled Laws; and to add sections 955, 2912b, 2912f, and 2912g.

(This bill was considered earlier today, amendments offered and the yeas and nays ordered. See p. 1754.)

The question being on the adoption of the amendment offered by Senator Pollack to the substitute, the Senators voted as follows:

Roll Call No. 502

Yeas—37

Arthurhultz	Dingell	Hart	Posthumus
Berryman	Dunaskiss	Hoffman	Pridnia
Bouchard	Ehlers	Holmes	Schwarz
Carl	Emmons	Honigman	Smith
Cherry	Faust	Kelly	Stabenow
Cisky	Faxon	Koivisto	Van Regenmorter
Conroy	Gast	McManus	Vaughn
DeGrow	Geake	Miller	Wartner
Dillingham	Gougeon	Pollack	Welborn
DiNello			

Nays—0

Excused—0

Not Voting—1

O'Brien

The amendment was adopted.

The question being on concurring in the House substitute, as amended, the Senators voted as follows:

Roll Call No. 503

Yeas—27

Arthurhultz	Dingell	Gougeon	Posthumus
Berryman	Dunaskiss	Hart	Pridnia
Bouchard	Ehlers	Hoffman	Schwarz
Cisky	Emmons	Honigman	Van Regenmorter
Conroy	Faust	Koivisto	Wartner
DeGrow	Gast	McManus	Welborn
DiNello	Geake	Miller	

Nays—11

Carl	Faxon	O'Brien	Stabenow
Cherry	Holmes	Pollack	Vaughn
Dillingham	Kelly	Smith	

Excused—0

Not Voting—0

The substitute was concurred in, a majority of the Senators serving having voted therefor.

The question being on concurring in the recommendation of the committee to give the bill immediate effect,

The recommendation was concurred in, 2/3 of the Senators serving having voted therefor.

Protests

Senators Kelly, Smith, Stabenow, Pollack, Cherry and Carl, under their constitutional right of protest (Art. IV, Sec. 18), protested against concurring in the House substitute, as amended, to Senate Bill No. 270.

Senators Kelly and Cherry moved that the statements they made during the discussion of the bill be printed as their reasons for voting "no."

The motion prevailed.

Senator Kelly's statement, in which Senators Smith and Pollack concurred, is as follows:

To members, for the last decade and a half this has been one of those recurrent issues in Michigan I've first had to deal with. When I came here initially it was the termination of the Brown-McNeely fund and the Brown-McNeely fund was a state attempt to intervene in the marketplace where private insurance companies would no longer provide the level of coverage or the type of coverage that physicians in this state needed. At that time it was determined that there was so much competition for malpractice insurance in Michigan that we would abolish the state fund and allow private insurance companies to come in and provide that insurance. And we would take that surplus and convert a good portion of it to the state general fund and remit some back to the physicians who had been policyholders.

It was an interesting watershed point for us because ever since then we haven't been able to get any real or accurate information on what's taken place in the malpractice insurance premium environment ever since. Now we've asked repeatedly in legislation and in lawsuits and in inquiries what the profitability of those firms were and we've been denied access through the courts and through the insurance commissioners, and voluntarily through the premium payers who wanted to know as well what the true picture on the malpractice environment is in Michigan.

So operating in totally ignorance to the facts, operating without any inspherical foundation for the arguments that are being put forward for this bill, we're going to tinker with the system. We're going to enact some changes that are going to fundamentally shape the quality of justice for people in this state. This bill is a bad bill. This is a bad idea and we can't have a good idea and a correction until we know, as I said, what all the facts are. But what we do know is that this piece of legislation is going to create what I believe is an unconstitutional, two-tiered system.

There are different types of victims of malpractice who are going to be able to receive differential awards based on who they are, rather than the wrong that was committed. I mean this is analogous in criminal laws in assigning different types of penalties to criminals based upon whether or not the victim of the crime deserved it or not—a ridiculous concept. More importantly, it's a concept that's going to be challenged in the courts. So all of the comments out there

about this being some way to limit what attorneys are going to do of just giving them a gold mine in terms of future litigation, and believe me, it will be pursued.

It will be pursued because it really does impact on the fundamental rights of every person in this state. We have done something in this legislation that hadn't been contemplated in previous attempts. That is ludicrous on its face. Madam President, death is no longer one of those second-tier offenses under this legislation. It's becomes a minor consideration in the course of a physician's malpractice, so that even though the person, even though that doctor had a duty that was owed to that particular victim. And even though that doctor may have breached that duty and it results in that person's death, we've now eliminated them from due process that would normally be available to anyone else in our judicial system.

The judges under this system are given the ultimate authority. Our jury process that was established under the United States Constitution is one of those devices to eliminate some of the frustration that people had with unrepresentative government. Juries are eliminated from the equation. Judges now make the threshold decisions. Judges will have inordinate authority to determine who will receive and who will be able to rectify the wrongs that have been committed against them. I can't believe that we want to revert to that monarchial state. I cannot believe that we want to go back in terms of the due process that we offer the citizens of this country, of this state.

What's more important is, if you look at it objectively, if you look at it in the clear and plain-meaning of the language in the bill, you are stopping information from going to the people who will be making decisions. We have placed not de minimis burdens on the evidence that may be introduced, but we've created incredible thresholds that will keep from the people who'll decide whether it will be a judge or a jury—the information that may be necessary for them to come to the right conclusion. We have restricted those who may offer evidence in court, those who may speak, regardless of the truth to a handful of physicians and clinicians who are dependent for their very existence on the people within the medical community. We make it impossible for those who are outside this little conspiracy to be able to come forward and render an objective opinion, even when the wrong is so grievous it may be perceptible to almost anyone. But there's no one to point it out, then it is never brought up and it can never be dealt with.

So I think we're compounding public misinformation. I don't think we are solving any of the problems that we had set out to solve when the hearings started and when this legislation was offered this last cycle. And I've heard repeatedly the discussions that this was going to assist physicians. But the economics of where physicians locate, the economics of why a physician goes to a rural area or works in a particular hospital, regardless of the anecdotal evidence that's been offered, is not dependent upon malpractice insurance premiums. Physicians are trained in this state in a higher proportion to other states. Physicians do their residencies here from all over the country and then they go back to their homes, just like most of you would do if you had the opportunity to have that kind of education. To manipulate those numbers and say that they're leaving because of the malpractice insurance premiums is wrong.

As to hospital closings, all of you know that this state has been going through a profound contraction over the last two decades in the delivery of health care services. Partly because of technological costs and capital costs and partly just because the nature of urban settlements has changed where people live and what they want. I mean, anyone who could go to a world-class medical center that's 45 minutes away in Ann Arbor is going to go to that particular facility or Burgess in Kent County or Bronson, when the alternative is to go to a small hospital or small service provider that may not have the technology and the physicians to deliver it. And most of you know that. But it does give good cover for voting for this legislation.

I have recommended to Senator Cherry that we put a requirement in the bill, since his amendment was removed in terms of the 20% reduction, we should put a requirement in the bill that when the malpractice premiums go out after this legislation passes that they should include with those premiums a list of all those legislators who voted for this legislation, because believe me, there will not be rate relief. You know it and I know it, and this canard will go on and they will come back with further ideas to erode due process and to stop those people who should be held accountable for malpractice from getting the justice that all of us believe should be exacted against them.

So the insurance companies will have a victory today and it will provide some short-term relief for their shareholders. But I'm sure that they have the power. I'm sure they have the suasion of a propaganda campaign that's successful in getting them this far to carry them into the next wave of legislation which will probably fall far as well.

Senator Stabenow's statement is as follows:

I voted "no" on the previous bill, in spite of the fact that I'm very concerned about the cost of medical malpractice insurance. I've supported reforms in the past. However, after watching what happened after 1986 when we were told at that time that costs would go down for providers with the reforms that were made then. We didn't see that happen. Instead we saw, unfortunately for providers, DRGs and Medicaid rates go down and hospital closings and a lot of other things that have added to pressures on hospitals and physicians. But we have not seen their premiums go down.

Unfortunately, the bill that was passed does dramatically limit protections to victims of malpractice. But it does not require that savings from those restrictions to be passed on to health care providers. The bill also was improved by the Pollack amendment, but it still discriminates against women who've had damage to their reproductive systems, which is of concern to me.

It seems to me it's been another good week for insurance companies. Last week the Senate eliminated a major competitor of theirs by eliminating the Accident Fund. This week we're allowing them to limit their costs with no requirements that they pass that on to health care providers that we're concerned about maintaining in this state. I don't think this is as good as we could have done and I'm very concerned that we will be back here in a few more years hearing about rates going up. And we'll be back to the table again for the third time, unfortunately, having to address this on behalf of health care providers.

Senator Cherry's first statement is as follows:

When this bill was originally before the Senate, I had offered an amendment that would have required malpractice premiums to be rolled back by 20%. I had offered that amendment because the good Senator from the 28th District had said in the course of debate that a number of insurance companies had testified on this bill and they all felt like they would be rolling their rates back by at least 20%. It seemed to me at the time that if they all felt they could roll back 20%, and if the purpose of the bill was to reduce malpractice premiums, it was only fair that if we were going to reduce a person's tort access to remedy, that we assure that the bill accomplish its purpose, which was to reduce malpractice premiums by 20%.

This body agreed with me and adopted that amendment. In the House, that amendment required a 20% roll back in malpractice premiums was taken out of the bill. So consequently, Madam President, I will be voting "no" on concurring in the House substitute and would urge others to do likewise. It seems to me that we've all along represented this bill as an effort to reduce malpractice premiums. The very amendment and provision that would have required that that happens, has been removed from the bill. On that basis, Madam President, I will vote "no."

Senator Cherry's second statement is as follows:

I heard a lot of good arguments about how we need to help our physicians; how that is a major issue or that crisis is a major issue facing the state. There's much of what's being said that I agree with. The problem I have is that the bill before us doesn't necessarily help them at all. It does help their insurance company, but there's no clear guarantee that their insurance company is going to pass that savings on to those doctors who need that savings to do all that we want them to do. I mean, we've been through this set of reforms before and in fact we saw no financial relief. We in the Senate guaranteed that there would be financial relief when we passed the bill out of here. We guaranteed that the physicians of the state or prospective physicians would be able to enjoy a less costly malpractice premium which would attract new doctors, which would assure that our present physicians would remain in business, which would assure that the medical costs that we all have to face day in, day out could be reduced. That is what we sent to the House.

The House returned to us a bill that removed that guarantee. I would like to do all that is being said that we should do on behalf of our physicians. Unfortunately, the bill before us in the form amended by the House doesn't accomplish that.

Senator Carl's statement is as follows:

Since coming to the legislature, I have consistently opposed government attempting to assign the value of human life by saying that a family may recover only a limited specified amount if a patient loses his or her life due to the negligence or gross negligence of a medical practitioner.

Senate Bill 270, it seems to me, is a classic or walian expression by the legislature to claim omniscience and omnipotence as to life itself. Apparently, all knowing and all powerful big brother is able to determine for all, the value of each and every human being who suffers a wrongful death. I recognize that there is no perfect way to determine what damages should be in a medical malpractice case, but my vote will continue to air, if it airs at all, on the side of individual rights in upholding the present jury system.

It is truly ironic that when it comes to electing men and women to the legislature, we consider the general public to be a great repository of wisdom, but when it comes to civil trials, our faith in our democratic system as it relates to juries is greatly diminished.

Senator Emmons asked and was granted unanimous consent to make a statement and moved that the statement be printed in the Journal.

The motion prevailed.

Senator Emmons' statement is as follows:

I'm going to vote for this bill. I lost my doctor and in my town there is no doctor that I can get right now to take me, let alone any Medicaid mother who is pregnant. And I think it's time that we did something to make our state more hospitable to the doctors so they come here. My hospital is out canvassing, sending letters, doing everything they can to bring doctors into my community. It's not being successful and this is a major reason.

The President pro tempore, Senator Ehlers, resumed the Chair.

ADDENDUM E

No. 36

JOURNAL

OF THE

House of Representatives

88th Legislature

REGULAR SESSION OF 1995

Lansing, Thursday, April 27, 1995.

1:00 p.m.

The House was called to order by the Speaker.

The roll of the House was called by the Clerk, who announced that a quorum was present.

Agee—present
Alley—present
Anthony—present
Bando—present
Baird—present
Bankes—present
Bennane—present
Berman—present
Bobier—present
Bodem—present
Brackenridge—present
Brater—present
Brewer—present
Bryant—present
Bullard—present
Bush—present
Byl—present
Cherry—present
Claramitaro—present
Clack—present
Crissman—present
Cropsey—present
Curtis—present
Dalman—present
DeHart—present
DeLange—present
DeMars—present
Dobb—present
Dobronski—present
Dolan—present
Emerson—present
Fitzgerald—present
Freeman—present
Gagliardi—present
Galloway—present
Geiger—present
Gernaat—present
Gilmer—present
Gire—present
Gnodtke—present
Goschka—present
Green—present
Griffin—present
Gubow—present
Gustafson—present
Hammerstrom—present
Hanley—present
Harder—present
Hertel—present
Hill—present
Hillegonds—present
Hood—present
Horton—present
Jamian—present
Jaye—present
Jellema—present
Jersevic—present
Johnson—present
Kaza—present
Kelly—present
Kilpatrick—present
Kukuk—present
LaForge—present
Law—present
Leland—present
LeTarte—present
Llewellyn—present
London—present
Lowe—present
Martinez—present
Mathieu—present
McBryde—present
McManus—present
McNutt—present
Middaugh—present
Middleton—present
Munsell—present
Murphy—present
Nye—present
Olshove—present
Owen—present
Oxender—present
Palamara—present
Parks—present
Perricone—present
Pitoniak—present
Porreca—present
Price—present
Profit—present
Randall—present
Rhead—present
Rocca—present
Ryan—present
Saunders—excused
Schroer—present
Scott—present
Sikkema—present
Stallworth—excused
Tesanovich—present
Varga—present
Vaughn—present
Voorhees—present
Walberg—present
Wallace—present
Weeks—present
Wetters—present
Whyman—present
Willard—present
Yokich—present

e/d/s = entered during session

Baade	Freeman	Leland	Scott
Bennane	Gagliardi	Martinez	Tesanovich
Berman	Gire	Murphy	Vaughn
Brater	Gubow	Olshove	Wallace
Brewer	Hanley	Owen	Weeks
Cherry	Harder	Palamara	Wetters
Cropsey	Hertel	Parks	Willard
Curtis	Hood	Pitoniak	Yokich
DeHart	Kelly		

Nays—57

Alley	Geiger	Jellema	Middleton
Bankes	Gernaat	Jersevic	Munsell
Bobier	Gilmer	Johnson	Nye
Bodem	Gnodtke	Kaza	Oxender
Bracksnridge	Goschka	Kukuk	Perricone
Bryant	Green	Law	Porreca
Bullard	Griffin	LeTarte	Randall
Bush	Gustafson	Llewellyn	Rhead
Byl	Hammerstrom	London	Rocca
Crissman	Hill	Lowe	Ryan
Dalman	Hillegonds	McBryde	Sikkema
DeLange	Horton	McManus	Voorhees
Dolan	Jamian	McNutt	Walberg
Fitzgerald	Jaye	Middaugh	Whyman
Galloway			

In The Chair: Fitzgerald

Rep. Clack moved to amend the bill as follows:

1. Amend page 2, following line 6, by inserting:

"Sec. 1483. (1) In an action for damages alleging medical malpractice by or against a person or party, the total amount of damages for noneconomic loss recoverable by all plaintiffs, resulting from the negligence of all defendants, shall not exceed $280,000.00 unless, as the result of the negligence of 1 or more of the defendants, 1 or more of the following exceptions apply as determined by the court pursuant to section 6304, in which case damages for noneconomic loss shall not exceed $500,000.00:

(a) The plaintiff is hemiplegic, paraplegic, or quadriplegic resulting in a total permanent functional loss of 1 or more limbs caused by 1 or more of the following:

(*i*) Injury to the brain.

(*ii*) Injury to the spinal cord.

(b) The plaintiff has permanently impaired cognitive capacity rendering him or her incapable of making independent, responsible life decisions and permanently incapable of independently performing the activities of normal, daily living.

(c) ~~There has been~~ THE PLAINTIFF HAS permanent loss of or damage to a reproductive organ resulting in the inability to procreate.

(D) THE INDIVIDUAL UPON WHOM THE ACTION IS BASED DIED AS A RESULT OF THE MEDICAL MALPRACTICE.

(2) In awarding damages in an action alleging medical malpractice, the trier of fact shall itemize damages into damages for economic loss and damages for noneconomic loss.

(3) As used in this section, "noneconomic loss" means damages or loss due to pain, suffering, inconvenience, physical impairment, physical disfigurement, or other noneconomic loss.

(4) The state treasurer shall adjust the limitation on damages for noneconomic loss set forth in subsection (1) by an amount determined by the state treasurer at the end of each calendar year to reflect the cumulative annual percentage change in the consumer price index. As used in this subsection, "consumer price index" means the most comprehensive index of consumer prices available for this state from the bureau of labor statistics of the United States department of labor.".

The question being on the adoption of the amendment offered by Rep. Clack,

Rep. Wallace demanded the yeas and nays.

The demand was supported

The question being on the adoption of the amendment offered by Rep. Clack,

The amendment was not adopted, a majority of the members serving not voting therefor, by yeas and nays, as follows:

Roll Call No. 379

Yeas—43

Agee	DeHart	Kelly	Price
Anthony	DeMars	Kilpatrick	Profit
Baade	Dobronski	LaForge	Schroer
Bennane	Emerson	Leland	Scott
Berman	Freeman	Martinez	Tesanovich
Brater	Gire	Murphy	Vaughn
Brewer	Gubow	Olshove	Wallace
Cherry	Hanley	Owen	Weeks
Ciaramitaro	Harder	Palamara	Willard
Cropsey	Hertel	Parks	Yokich
Curtis	Hood	Pitoniak	

Nays—58

Alley	Geiger	Jersevic	Munsell
Bankes	Gernaat	Johnson	Nye
Bobier	Gilmer	Kaza	Oxender
Bodem	Gnodtke	Kukuk	Perricone
Brackenridge	Goschka	Law	Porreca
Bryant	Green	LeTarte	Randall
Bullard	Griffin	Llewellyn	Rhead
Bush	Gustafson	London	Rocca
Byl	Hammerstrom	Lowe	Ryan
Crissman	Hill	McBryde	Sikkema
Dalman	Hillegonds	McManus	Voorhees
DeLange	Horton	McNutt	Walberg
Dolan	Jamian	Middaugh	Wetters
Fitzgerald	Jaye	Middleton	Whyman
Galloway	Jellema		

In The Chair: Fitzgerald

Rep. Clack moved to amend the bill as follows:

1. Amend page 6, line 10, after "SECTION" by inserting "2957 OR".

2. Amend page 6, line 20, after "FAULT." by inserting "IF THE TRIER OF FACT DETERMINES FROM EVIDENCE PRESENTED DURING TRIAL THAT DAMAGES RESULTED FROM 2 OR MORE DEFENDANTS ACTING IN CONCERT, THE TRIER OF FACT SHALL ALLOCATE A PERCENTAGE OF FAULT TO THOSE DEFENDANTS AS A GROUP AND LIABILITY AS BETWEEN THOSE DEFENDANTS IS JOINT AND SEVERAL.".

The question being on the adoption of the amendments offered by Rep. Clack,

Rep. Wallace demanded the yeas and nays.

The demand was supported.

The question being on the adoption of the amendments offered by Rep. Clack,

The amendments were not adopted, a majority of the members serving not voting therefor, by yeas and nays, as follows:

ADDENDUM F

Legislative
Analysis
Section

Olds Plaza Building, 10th Floor
Lansing, Michigan 48909
Phone: 517/373-6466

Senate Bill 270 (Substitute H-1)
Sponsor: Senator Dan L. DeGrow

House Bill 4403 (Substitute H-1)
Sponsor: Rep. Lynn Owen

House Bill 4404 (Substitute H-1)
Sponsor: Rep. Lynn Owen

First Analysis (4-1-93)
Senate Committee (SB 270): Judiciary
House Committee: Judiciary

THE APPARENT PROBLEM:

In 1986, the legislature enacted a series of reforms aimed at growing concerns about the effect of the medical liability system on the availability and affordability of health care in Michigan. Reforms that specifically addressed medical liability issues included limiting awards for noneconomic loss (that is, pain and suffering) to $225,000 (with exceptions), specifying qualifications for expert witnesses, constricting the statute of limitations for bringing a medical malpractice lawsuit, providing for the dismissal of a defendant upon an affidavit of noninvolvement, requiring mediation, and requiring each party either to provide security for costs or to file an affidavit of meritorious claim or defense.

Opinion is widespread in the medical community and elsewhere that these reforms have proved inadequate. Providers of medical care and malpractice insurance cite numerous statistics to support their case. For both doctors and hospitals, medical malpractice insurance costs much more in Michigan than elsewhere, and, while Detroit area hospitals pay the highest liability rates in the country, even smaller, outstate hospitals pay more than some urban hospitals elsewhere: the average liability cost per bed is $1,400 nationally, $4,600 for the state as a whole, and $6,900 in Detroit, while the $2,800 per bed average for rural Michigan is higher than figures cited for Chicago and Cleveland. A 1990 report of the U.S. Government Accounting Office (GAO) confirms that while rates declined in the nation and adjacent states since about 1988, Michigan rates have continued to increase, although at a slower rate since 1986.

Reports are that only 37 cents of each dollar spent on medical liability premiums goes to victims of malpractice, while roughly half of the money paid in premiums goes to legal fees (plaintiff and defense combined) and court costs. Payouts per claim are increasing; one hospital insurer reports a 173 percent increase--from $51,000 to $139,000--in its average payout per claim between 1986 and 1990. Lawsuits, too, are on the rise, threatening to widen the gap between Michigan and other states; nationally, about a half-dozen lawsuits are filed annually for every 100 physicians, but the figure for Michigan is closer to 20 lawsuits per 100 physicians.

Using survey results and anecdotal evidence, critics of the current system maintain that litigiousness and the high cost of insurance in Michigan drive out physicians, either literally out of the state, or out of practice through early retirement; many other physicians choose to remain in practice, but eliminate costly elements such as obstetrics that carry a comparatively high risk for lawsuits ($1 million per occurrence/$3 million aggregate obstetrical coverage in Detroit costs $134,000 annually; for $100,000/$300,000 coverage, the annual cost is $63,000). The medical liability climate thus is held partly responsible for problems that people in urban centers and rural areas have in obtaining medical care, as well as responsible for increasing health care costs by forcing physicians to practice "defensive medicine."

One thing that carries the potential to reduce the time and expense of malpractice lawsuits is the use of binding arbitration. However, existing arbitration

provisions, which date to 1975, are little used; lack of participation has been attributed to patients' distrust of the current makeup of arbitration panels (which must have a physician as one of the three members), physician reluctance to serve on panels, the unwieldy process, and a lack of incentives to participate.

To alleviate problems with the state's medical liability system and address widespread dissatisfaction with it, further reforms have been proposed.

THE CONTENT OF THE BILLS:

Senate Bill 270 would amend the Revised Judicature Act (MCL 600.1483 et al.) to do the following with regard to medical malpractice actions: revise limits on noneconomic damages and link them to compliance with proposed financial responsibility requirements, limit attorneys' contingency fees, require expert witnesses to be of the same board-certified specialty or health profession as the defendant, forbid certain discovery actions by counsel ascertaining whether a witness was qualified, bar a plaintiff from receiving payment for the loss of an opportunity to survive, require a plaintiff to notify a defendant 182 days before filing a suit, provide for the waiver of the physician-patient privilege when a malpractice suit is commenced, enact new provisions on voluntary binding arbitration, generally constrict the statute of limitations on suing for injuries done to minors, and eliminate the tolling (suspension) of the statute of limitations when a foreign object was left in the body.

The bill is tie-barred to House Bills 4403, 4404, and the "physician discipline" package (House Bills 4076, 4295, and companion bills); it also is tie-barred to House Bill 4033 (now in the House Committee on Mental Health), which under a proposed substitute would bring mental health professionals and facilities into the package. Generally speaking, provisions that are procedural in nature (such as those dealing with expert witnesses, arbitration, and the 182-day notice requirement) would apply to cases filed on or after October 1, 1993, while substantive provisions (such as those dealing with noneconomic loss limits and statutes of limitations) would apply to causes of action arising on or after October 1, 1993.

A more detailed explanation follows.

Noneconomic losses. The bill would replace the current $225,000 limit on noneconomic losses (which statutory adjustments for inflation have increased to a reported $280,000) and the exceptions to it with a two-tier limit. Generally, payment for noneconomic losses could not exceed $500,000. However, the limit would be $1 million if there had been a death, if there were a permanent disability due to an injury to the brain or spinal cord, if damage to a reproductive organ left a person unable to procreate, or if a medical record had been illegally destroyed or falsified. The award caps would be halved for a defendant who was in compliance with the financial responsibility requirements proposed by House Bill 4404. Caps would be annually adjusted for inflation.

Contingency fees. An attorney's contingency fee would be limited to 15 percent of the amount recovered if the claim was settled before mediation or arbitration, 25 percent if settled after mediation or arbitration but before trial, and 33-1/3 percent if the claim went to trial. (Court rules limit contingency fees to 33-1/3 percent.) The bill would prescribe the manner of computing the fee, require a contingency fee agreement to be in writing, and require an attorney to make certain disclosures regarding fees. An attorney whose contingency fee agreement provided for a contingency fee in excess of that allowed could not collect more than what would be received under his or her usual hourly rate of compensation, up to the amount provided by the applicable contingency fee limit.

Expert witnesses. At present, if the defendant physician or dentist is a specialist, an expert witness must be of the same or related specialty and at the time devoting a substantial portion of his or her professional time to either active clinical practice or medical or dental school instruction. Under the bill, each expert witness (not just those in cases involving specialists) would have to have spent a substantial portion of the preceding year in active clinical practice in the same health profession as the defendant or in the instruction of students. If a defendant was board-certified, the witness would have to be, and if the defendant was a general practitioner, the witness would have to either be a general practitioner or instructing students.

Neither the tax returns nor the personal diary or calendar of an expert witness could be sought or used by counsel to determine whether an expert

witness was qualified, and counsel would be forbidden from interviewing the witness's family members concerning the amount of time the witness spent engaged in his or her health profession.

Lost opportunity to survive. A plaintiff would be barred from recovering for a lost opportunity to survive.

Advance notice of suit. For the stated purposes of promoting settlement without the need for formal litigation, reducing the cost of medical malpractice litigation, and providing compensation for meritorious medical malpractice claims that would otherwise be precluded from recovery because of litigation costs, the bill would require a plaintiff planning to file suit to notify a defendant at least 182 days before commencing court action. The notice could be filed later if a statute of limitations was about to apply. Meeting the 182-day requirement for one defendant would cover meeting it for any future defendants added to the suit. The notice would have to contain certain minimum information about the case and its basis.

The claimant and the defendant would have to give each other access to each other's medical records within 91 days after the notice. A defendant's failure to allow timely access to records would be penalized under provisions regarding affidavits of merit and interest on judgments (see below). Within 126 days after the notice, the defendant would have to furnish the claimant with a written response with certain information about the defense; failure to provide the information on time would entitle the claimant to file suit immediately.

Affidavits of merit. Existing law requires plaintiffs and defendants either to post a $2,000 bond or other financial security for payment of costs, or to file an affidavit of meritorious claim or defense. The bill would delete provisions allowing security for costs to be filed in lieu of an affidavit. Affidavits would have to contain information on the basis and allegations of the case, as prescribed by the bill (this information would parallel that to be exchanged under the 182-day notice provisions). If the defendant failed to allow access to medical records as required by the 182-day notice provisions, a plaintiff's affidavit could be filed 91 days after the complaint.

Professional privilege. Someone claiming malpractice would be considered to have waived the physician-patient privilege or similar privilege with respect to a person or entity who was involved, whether or not that person was a party to the claim or action. A defendant could communicate with other health facilities or professionals to obtain relevant information and prepare a defense; disclosure of that information to the defendant would not constitute a violation of the physician-patient privilege.

Arbitration. The bill would repeal Chapter 50a of the act, which provides for arbitration of medical malpractice lawsuits, and replace it with provisions for voluntary binding arbitration that would apply to cases where damages claimed amounted to $75,000 or less, including interest and costs. The bill's arbitration procedures would be available during the 182-day notice period (that is, after notice was given but before a case was filed). Unlike current law, which calls for an arbitration panel consisting of a doctor, a lawyer, and someone who is neither, under the bill the parties would agree to a process for the selection of a single arbitrator. The arbitration agreement would also apportion the costs of the arbitration and contain waivers of the right to trial and appeal; defendants would waive the question of liability. The parties could agree to a total amount of damages greater than $75,000.

There would be no live testimony, and court rules on discovery would not apply, although certain information would have to be exchanged upon request under deadlines established by the arbitrator. The arbitrator could issue the decision with or without holding a formal hearing, although he or she would have to conduct at least one telephone conference call or meeting with the parties. If there was a hearing, it would have to be limited to presentation of oral arguments. The arbitrator would issue a written decision stating the factual basis for it and the amount of any award. There would be no right to appeal the award.

Settlements. If a case was settled (with or without court supervision), the parties would have to file a copy of the settlement agreement with the appropriate bureau of the Department of Commerce. The information would be confidential except for use by the department in an investigation; it would not be subject to the Freedom of Information Act.

Mediation. Current law provides for mediation of medical malpractice suits. Under the bill, if a

defendant rejected a mediation panel's evaluation, but the plaintiff did not, and the case went to trial, the defendant's insurer would be liable for the plaintiff's costs unless the verdict was more favorable to the defendant than the mediation evaluation.

Statute of limitations--general. Generally, a medical malpractice action must be commenced within two years after the injury was caused, or six months after it was or should have been discovered, whichever was later; however, in no event may it be commenced more than six years after the injury was caused. However, for certain injuries, this six-year statute of repose does not apply; the bill would eliminate an exception for situations where a foreign object was wrongfully left in the patient's body, and limit an exception for reproductive injuries to those where there was a loss of the ability to procreate in someone under 35 years old. An exception for fraudulent conduct of a health care provider would be retained. Giving 182-day notice as required by the bill would toll (suspend the running of) the statute of limitations.

Statute of limitations--minors. The running of the statute of limitations is suspended until someone reaches age 13. For injuries to a child that occur before age thirteen, action must be commenced by the time the child reaches age 15; after age 13 the regular medical malpractice statute of limitations applies. Under the bill, the running of the statute of limitations would be suspended until a child reached age 10, and an action for a child under that age would have to be commenced before the child's twelfth birthday, or within the regular medical malpractice period of limitations, whichever was later (the six-year statute of repose would not apply).

However, if an injury to the reproductive system of someone under age 13 was claimed, the claim would have to be brought before his or her fifteenth birthday or before the regular medical malpractice statute of limitations would apply, whichever was later (the six-year statute of repose would not apply).

Interest on judgments. The law now provides for the calculation and payment of interest on judgments. Under the bill, if a medical malpractice defendant failed to allow access to records as required by the 182-day notice provisions, the court would order that interest be calculated from the date notice was given to the date of satisfaction of the judgment. The injured party, and not his or her attorney, would receive the interest accruing on the portion of a judgment represented by the attorney's fee.

House Bill 4403 would amend the Insurance Code (MCL 500.2204) to require an commercial liability insurer to pay the plaintiff's attorney fees and court costs when an insured defendant had rejected a mediation evaluation under the Revised Judicature Act, the plaintiff had not rejected it, and the case went to trial. However, the payment requirement would not apply if the verdict was more favorable to the defendant than the mediation evaluation. The bill could not take effect unless Senate Bill 270 was enacted.

House Bill 4404 would amend the Public Health Code (MCL 333.16280 and 333.21517) to require each physician, dentist, psychologist, chiropractor, and podiatrist to maintain financial responsibility for medical malpractice actions. The financial responsibility would have to be one of the following: a $200,000 surety bond or irrevocable letter of credit; an escrow account containing at least $200,000 in cash or unencumbered securities; or professional liability insurance coverage with limits of at least $200,000 per claim and $600,000 in the aggregate.

Someone licensed on or before October 1, 1993 would have to file proof of financial responsibility with his or her licensing board by January 1, 1994. Others would have to file proof within 90 days after the issuance of a license. After the initial filing, proof would have to be filed annually.

Financial responsibility requirements would not apply to someone with a hospital affiliation, if the hospital provided the equivalent amount of financial responsibility. However, if the person practiced outside of the hospital, he or she would have to maintain financial responsibility for that portion of his or her practice performed outside the hospital.

Financial responsibility requirements would not apply to someone whose practice outside of a hospital consisted of at least 25 percent uninsured and Medicaid patients, based on the total number of patients treated annually by the person. Proof of such a practice would have to be filed with the person's board.

A hospital would be prohibited from granting privileges to a physician unless financial responsibility requirements were met. Compliance with the bill would not be a condition of licensure for a physician or other person required to maintain financial responsibility.

The bill could not take effect unless Senate Bill 270 was enacted.

FISCAL IMPLICATIONS:

Fiscal information is not available at present.

ARGUMENTS:

For:

The bills would go far to discourage unjustified medical malpractice lawsuits and reduce the costs of the medical malpractice liability system, thus helping to contain spiraling health care costs, stem the flight of physicians out of Michigan, and assure the citizens of this state access to affordable health care. Stricter limits on pain and suffering awards, limits on contingency fees, early notice requirements, and new arbitration provisions would reduce litigation costs by encouraging arbitration and early settlement and curbing excessive awards.

New limits on pain and suffering awards and the medical malpractice statute of limitations would help to further reduce insurance costs by addressing the uncertainties and long period of exposure in this highly volatile area of insurance. Without such measures and controls on the costs of litigation, there is little to be done to reduce premiums, for neither they nor profits are inflated: the major malpractice insurers are customer-owned (that is owned by physicians or hospitals), and the insurance bureau reports a healthy degree of competition in the marketplace.

Victims of medical malpractice would not be ignored, however: requirements for physicians to maintain financial responsibility, provisions on payment of judgment interest, and incentives to arbitrate small suits that might otherwise go begging for legal representation all would help to put money in injured patients' pockets. Links to the physician discipline package would recognize the need to also protect patients by reducing the incidence of malpractice. And, eventually, the bills would help patients by holding back health care costs, and not only through effects on premiums; far greater savings are likely through easing physicians' litigation fears, thus reducing the need to practice "defensive medicine" which drives up the cost of health care through the use of high technology and second opinions.

The bills offer a balanced compromise that should streamline the system to the ultimate benefit of both patients and health care providers.

Against:

Many dispute whether there is really any sort of malpractice "crisis" that demands resolution, and certainly not resolution by restricting legal recourse for victims of malpractice. If malpractice litigation appears to be a problem in Michigan, it is because Michigan ranks low in its effectiveness in getting bad doctors out of business, and because insufficient attention has been devoted to risk management in hospitals, where the vast majority of malpractice claims arise. If insurance costs too much, it is because insurers are charging too much; profits are up in recent years, but premiums continue to rise. More carriers are writing malpractice insurance in Michigan, and availability problems have decreased.

The numbers of physicians are up, not down, thus countering assertions that Michigan's malpractice climate has led to problems in obtaining care. Moreover, it is unreasonable to hold the medical malpractice system responsible for the lack of health care for residents of poor urban and rural areas of Michigan; recruiting doctors to such places is a problem across the country, and has long been so.

If rising costs of health care are a real concern, then attacking the medical liability system would have little effect: insurance premiums represent only one or two percent of total health care costs, and "defensive medicine" habits are unlikely to be affected (nor should they, say some, as the caution and thoroughness that characterize "defensive" medicine also characterize good medicine).

Virtually every assertion made by the proponents of medical liability reform has been challenged with conflicting data. Many believe the picture is not as clear as some present it, and urge restraint before prematurely assuming the reforms of 1986 need strengthening. Rather than again taking aim at the victims of malpractice, reformers should first look to the defects of the insurance and physician discipline systems.

Against:
While the reforms are a step in the right direction, they do not go far enough. Overly broad exceptions to caps on noneconomic awards would continue to allow half or more of major cases to get out from under the limits, as the language could be stretched to allow the exemption of many relatively minor injuries. A permanent limp, for example, could be argued to meet the exception for permanent disability.

Contingency fee provisions also are inadequate: without firm limits on attorneys' financial incentives to seek windfall awards in marginal cases, case filings are unlikely to decline. Worse, the proposed sliding scale would give attorneys an incentive to push for trial by giving them a bigger take than if they settled out of court or accepted arbitration.

Finally, Senate Bill 270 would do nothing to rid the system of professional witnesses. By allowing expert witnesses to qualify if they spent a "substantial portion" of their time in the necessary fields, the bill would continue to allow justice to be subverted by traveling "guns for hire."

Against:
Limits on contingency fees raise a number of constitutional issues. Being a matter of practice and procedure, contingency fees are properly within the constitutionally-determined purview of the supreme court, and are at present set by supreme court rule. To attempt to regulate contingency fees in statute would conflict with the court's constitutional rule-making authority and the doctrine of separation of powers. Statutory limits on plaintiffs' attorney fees may also violate constitutional provisions for equal protection, if defendants' fees are not also regulated. Finally, by inserting itself into a matter that is between attorney and client, Senate Bill 270 may intrude on the right to contract.

Against:
A major problem with the current state of affairs is the heavy financial burdens that a physician must assume if he or she practices in Michigan. Rather than ease those burdens, the legislation would add to them by requiring physicians to maintain a specified form of financial responsibility or lose hospital privileges. The financial responsibility requirements would tend to exacerbate problems with physicians leaving practice in Michigan.

POSITIONS:

The State Bar of Michigan opposed Senate Bill 270 as passed by the Senate, has concerns about the constitutionality of provisions on contingency fees, and is supportive of portions of the House substitute. (3-30-93)

The Michigan Trial Lawyers Association does not support the package. (3-30-93)

The Advocacy Organization for Patients and Providers does not believe the package will resolve the problem, in part because it is not linked to insurance reform. (3-30-93)

Physicians Insurance Company of Michigan (PICOM) opposes the package, but could support it with amendments. (3-30-93)

The Michigan Medical Liability Reform Coalition opposes the bills. (3-30-93) Organizations in the 75-member coalition include the following:

Greater Detroit Chamber of Commerce
Michigan Association for Local Public Health
Michigan Association of Osteopathic Physicians and Surgeons
Michigan Dental Association
Michigan Farm Bureau
Michigan Hospital Association
Michigan Hospital Association Mutual Insurance Company
Michigan Insurance Federation
Michigan Manufacturers Association
Michigan Physicians Mutual Liability Company
Michigan State Medical Society
Physicians Insurance Company of Michigan